



# Federal Register

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## **Part II**

### **Department of State**

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**22 CFR Parts 96, 97, and 98**

**Hague Convention on Intercountry  
Adoption; Intercountry Adoption Act of  
2000; Accreditation of Agencies; Approval  
of Persons and Intercountry Adoption—  
Preservation of Convention Records; Final  
Rules**

## DEPARTMENT OF STATE

## 22 CFR Part 96

[Public Notice 5296]

RIN 1400-AA-88

**Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons**

AGENCY: Department of State.

ACTION: Final rule.

**SUMMARY:** The Department of State (the Department) is issuing a final rule on the accreditation and approval of agencies and persons in accordance with the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention) and the Intercountry Adoption Act of 2000 (the IAA), after review of public comments received in response to the Department's September 15, 2003 issuance of a proposed rule. The Convention and the IAA generally require that agencies and persons be accredited or approved to provide adoption services for intercountry adoptions when both countries involved are parties to the Convention, and the IAA requires that the Department designate one or more qualified accrediting entities to accredit and approve agencies and persons. Today's new action establishes the accreditation and approval standards for agencies and persons that accrediting entities will use; establishes requirements applicable to potential accrediting entities; and establishes a framework for the Department's oversight of accrediting entities, agencies, and persons. This action is a necessary step toward bringing the Convention into force for the United States.

**DATES:** This rule is effective March 17, 2006. Information about the date the Convention will enter into force is indicated in the text of the final rule.

**FOR FURTHER INFORMATION CONTACT:** Corrin Ferber at 202-736-9172 or Anna Mary Coburn or Lisa Vogel at 202-736-9081. Hearing- or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1-800-877-8339.

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**I. Background**

The Convention is a multilateral treaty that provides a framework of safeguards for protecting children and families involved in intercountry adoption. It was developed under the auspices of the intergovernmental organization known as the Hague Conference on Private International Law (the Hague Conference).

The United States signed the Convention on March 31, 1994, and the President transmitted the Convention to the Senate for its advice and consent on June 11, 1998. (S. Treaty Doc. 105-51 at III (1998)). Differing versions of implementing legislation for the

Convention were introduced in both the Senate and the House of Representatives in 1999 and were subsequently referred to the appropriate committees. The Senate Foreign Relations Committee held hearings on October 5, 1999, and issued a committee report on S. 682 (Report of the Senate Committee on Foreign Relations on the Intercountry Adoption Act of 2000, 106th Cong. 2nd Sess., S. Rep. No. 106-276 (2000)). The House International Relations Committee held hearings on H.R. 2909 on October 29, 1999, and also issued a committee report. (Report of the House Committee on International Relations on the Intercountry Adoption Act, 106th Cong. 2nd Sess., H.R. Rep. No. 106-691 (2000)).

On September 20, 2000, the Senate gave its advice and consent to the ratification of the Convention and, at about the same time, Congress enacted the implementing legislation for the Convention, the Intercountry Adoption Act of 2000 (the IAA), Public Law 106-279, 42 U.S.C. 14901-14952. Consistent with U.S. policy on ratification of treaties and the Senate's advice and consent to ratification, the United States will not ratify the Convention until the United States is able to carry out its obligations under the Convention (See Senate Declaration for Convention Article 22(2) (146 Cong. Rec. S8866 (daily ed. Sept. 20, 2000))). Thus, although this Final Rule is effective in 30 days, except as otherwise indicated in the text of the rule, the Convention will not enter into force immediately upon passage of the 30 days.

The Convention gives party countries a choice about whether to rely exclusively on public authorities or to use private bodies to complete certain Central Authority functions listed in the Convention. If the Convention country chooses to use private bodies, the private bodies must be accredited agencies (nonprofit adoption service providers) or approved persons (for-profit and individual adoption service providers). The Senate's advice and consent to the ratification of the Convention, taken together with the IAA, establish that the United States will use accredited agencies and approved persons (referred to within this preamble as "adoption service providers" where appropriate) to perform certain U.S. Central Authority functions under the Convention. Other Central Authority functions will be performed, as appropriate, by the Department or by other governmental authorities such as the Department of Homeland Security (DHS).

The purpose of this final rule is to establish the regulatory framework for

the accreditation and approval function required under the Convention and the IAA. In developing the rule, we conducted an extensive preliminary public input phase, discussed at <http://www.hagueregs.org>, to garner adoption community input and to engage in a dialogue with stakeholders. On September 15, 2003, the Department published in the **Federal Register** a proposed rule on the accreditation and approval of agencies and persons (68 FR 54064). For a more detailed discussion of the Convention, the IAA, and the Department's basis for the rule, see the preamble to the proposed rule. The Department held a further meeting on October 28, 2003 to answer questions regarding the proposed rule. The initial 60-day deadline for submitting comments was extended 30 days, to December 15, 2003.

Since issuing the proposed rule, the Department has also initiated a selection process to recruit and identify qualified accrediting entities to accredit agencies and approve persons. (The Department solicited candidates by mailing Requests for Statements of Interest to the adoption licensing and child welfare services authorities of each State and to all private nonprofit organizations that had expressed interest in providing accreditation/approval services. It also posted the information soliciting statements of interest from qualified candidates on its Web site.) The Department thoroughly reviewed all applications received by the deadline of April 30, 2004. The Department met with qualified candidates in March 2005 to begin negotiating agreements to designate accrediting entities. (70 FR 11306, March 8, 2005). The Department will publish all agreements designating accrediting entities in the **Federal Register**, as required by the IAA.

Also published in today's **Federal Register** is the final rule for part 98 of title 22 of the CFR. It provides the rule for the preservation of Convention records by the Department and DHS. Separate rules, which are still under preparation, will establish intercountry adoption procedures under the Convention and the IAA's amendments to the Immigration and Nationality Act (INA).

## II. The Department's Implementation of the Convention and the IAA

Consistent with the IAA and the Convention, this rule creates an accreditation/approval system that does not displace State licensing of adoption service providers, but that does create new Federal requirements for agencies and persons handling adoption cases between the United States and other

countries party to the Convention. A number of commenters expressed a variety of concerns about the Department's approach to implementing the Convention and the IAA through an accreditation scheme that relies on accrediting entities selected by the Department to oversee and monitor adoption service providers. In response to those concerns, we want to reiterate the guiding principles behind this rule and the Federal accreditation scheme it creates.

### A. Accrediting Entities

Many commenters essentially objected to the use of accrediting entities, preferring the Department to assume direct responsibility for accreditation of agencies and approval of persons. It would be inconsistent with the IAA, however, for the Department to assume such a role. The IAA accreditation scheme provides for the Department to select and designate one or more accrediting entities to perform this function.

Some commenters sought more robust provisions controlling the conduct of accrediting entities. The IAA sections on accrediting entities left the Department discretion to negotiate by agreement how an accrediting entity will perform its accreditation duties. It would be unrealistic and unworkable to address these issues in the rule. We therefore have included in the final rule some provisions that will govern designated accrediting entities, but much of the conduct of accrediting entities will be governed by agreements in addition to these regulations. The use of agreements is consistent with the statute and provides the flexibility needed to handle relationships with multiple accrediting entities, which may differ in ways that require different provisions governing their relationships with the Department.

### B. Accreditation and Approval Standards

We received a wide range of public input on what accreditation/approval standards should be excluded from or added to subpart F of the rule (and correspondingly subpart N on temporary accreditation). Our responses to comments on specific standards are contained in the section-by-section discussion. We respond here, however, to a number of general concerns repeatedly expressed by commenters by explaining our overall conception of the accreditation standards.

We used the central purposes of the IAA and the Convention as a guide throughout the development of the standards for accreditation and

approval. These purposes are to protect the rights of, and prevent abuses against, participants in the adoption process in Convention cases, and to ensure that such adoptions are in the children's best interests. In addition, the IAA seeks to improve the ability of the Federal Government to assist prospective adoptive parent(s) in Convention cases involving the United States.

The standards in subpart F are based on the Convention and the IAA, particularly section 203(b). Where the Convention or the IAA speaks broadly, we have also sought to reflect current norms in adoption practice, as made known to us during the development of the rule.

In particular, the standards in subpart F reflect a focus on ensuring that agencies and persons provide adoption services with an individual child's best interests as the foremost goal. The standards also cover key areas of concern to adoptees, birth parents, and adoptive parents, such as financial transparency, ethical conduct in determining if a child is eligible for adoption and in obtaining medical records for a child, and sound social work practices when providing training and information to prospective adoptive parent(s). In reviewing the overall impact of the rule on agencies and persons in light of comments suggesting that the standards be loosened, we retained standards we consider necessary for implementing the Convention's and the IAA's goals of protecting participants in Convention adoptions.

Some commenters wanted the standards in subpart F to be cast as specific licensing criteria that must be met in all cases rather than as accreditation standards that must be "substantially" complied with. As explained in our response to comments on § 96.27 of subpart E, the Department believes that an accreditation model based on substantial compliance is more consistent with the regulatory approach the IAA contemplates. The performance-based standards created by subpart F (and subpart N) are the type of flexible standards common to the accreditation field generally, and thus are appropriate for implementing the IAA. The process of accreditation gives an accrediting entity discretion to identify problems in an agency's or person's operations and to provide an opportunity for correction.

### C. Enforcement

A number of commenters sought to have the Department play a primary role in enforcing substantial compliance by agencies and persons with the

accreditation standards. This view is inconsistent with the IAA, however, which dictates that the primary responsibility for oversight of agencies and persons lies with the accrediting entities. The accrediting entities will have discretion to determine which adverse action is appropriate in light of the particular standards in subpart F (or N) with which the agency or person is not in compliance. The Department may be required to intervene if the accrediting entity, after consultation with the Department, fails, or refuses, to take adverse action against an agency or person. The types of adverse actions and who can take them (accrediting entities or the Department) under what circumstances are covered in subparts K and L of the rule.

The Department was asked to permit "penalties" for failure to be in substantial compliance with the rule, other than the enforcement mechanisms called adverse actions created by the IAA, and to tie the violation of particular standards to particular penalties. We have not made such changes. The rule provides the full range of "penalty" options provided in the IAA for disciplining agencies and persons. Because the IAA mandates a substantial compliance model of accreditation, the rule does not require that accrediting entities impose particular penalties for violation of particular standards.

Other commenters raised a number of concerns related to the notice that an agency or person would receive of an adverse action, and the options that an agency or person would have for protesting the imposition of the adverse action. While the IAA limits review procedures that are available, the Department has made a number of clarifications in the final rule to address these concerns. (See the section-by-section discussion of subparts K and L.) The rule now clearly provides that an accredited agency or approved person will have either notice that it may be faced with an adverse action and an opportunity to show it is not warranted or, if notice is not provided, an equivalent after-the-fact opportunity to show that the action should be withdrawn. The rule also clarifies that the accrediting entity that imposed an adverse action can always withdraw the adverse action, if it determines that the action was imposed based upon mistake of fact or otherwise in error.

#### *D. Concerns About Conduct in Convention Countries*

We received many comments requesting that the Department address specific problems in countries of origin.

As Central Authority, the Department may be able to influence another Convention country's practices via diplomatic efforts and the provision of technical assistance. It is outside the scope of our authority, however, and inconsistent with the Convention's allocation of responsibilities between a country of origin and a receiving country, for us to impose specific rules on Convention countries. Therefore, we have not changed the final rule to cover conduct by other Central Authorities or their competent (public) authorities. As described in section III, subsection A, below, however, we have changed the standards U.S. agencies and persons will need to meet in using private providers in Convention countries. The standards, as changed, tie the accreditation of agencies and approval of persons to whether they have adequate arrangements in place to ensure that, when acting as a primary provider, they can provide "all adoption services in cases subject to the Convention" in a manner consistent with the IAA and the Convention. (See IAA section 203(b)(1)(B)). They are not intended to interfere with the allocation of responsibilities between countries party to the Convention.

### **III. Overview of Major Changes and Provisions in the Final Rule**

Discussed here are changes and provisions in the final rule that we believe are of particular interest to the public. A more thorough response to individual comments, and more complete discussion of significant changes made to the rule in response to comments, appears below in the section-by-section analysis. In addition to changes made in direct response to comments received by the Department, we have also made a number of changes for technical and policy reasons, the more significant of which are brought to the public's attention in the section-by-section analysis. We have made an effort to highlight such changes in the general discussion at the beginning of each subpart, with a brief explanation of why the Department considered them necessary. Changes of a purely technical nature (for example, changes made to conform to changes in other sections, for grammatical reasons, or to ensure consistency throughout the regulations) are not exhaustively identified because we believe they are self-explanatory.

#### *A. Primary Providers and Supervised Providers*

Many commenters were concerned about the rule's coverage of supervised providers, both in the United States and overseas. Many urged that the U.S.

accredited/approved primary provider be made responsible for any foreign providers that it selects and uses in the country of origin, whether public, accredited by the foreign country, or private and unaccredited.

In response to these concerns, we modified §96.14 of subpart C to increase the supervisory responsibilities of primary providers in the accreditation context. As discussed below at section III, subsection B.4, however, we removed provisions from subpart F that would have required a primary provider to assume the legal responsibility for tort, contract, and other civil claims against supervised providers and to carry liability insurance for its supervised providers. The final rule is not intended to have any effect on the allocation of legal responsibility for tort, contract and other civil claims. We also added concrete examples at §96.15 of subpart C to help explain, generally, the circumstances that require an adoption service provider to be accredited, temporarily accredited, approved, supervised, or exempted.

The IAA in section 201(a) provides that, if an agency or person is providing adoption services "in connection with a Convention adoption in the United States," it must be accredited, approved, or under the supervision of an accredited agency or approved person (with limited exceptions set forth in section 201(b)). The proposed rule established the general principle of a primary provider—that is, one accredited agency or approved person responsible for ensuring the provision of all adoption services in the Convention adoption case.

Under the proposed rule, a primary provider could work with accredited agencies or approved persons in the United States, or overseas with entities accredited by a Convention country or public authorities of a Convention country, without supervising or being responsible for their acts. The primary provider also was not responsible for supervising exempted providers or public domestic authorities in the United States. The primary provider was responsible only for supervising the acts of private agencies, persons, or other entities that were providing adoption services without any Convention accreditation or approval status.

We have kept the requirement in the final rule that the primary provider is responsible for all supervised providers on a case, but we have broadened the kinds of private entities that the primary provider must supervise. There are some differences in the standards that govern the primary provider's use of

other providers in the United States and in Convention countries. These differences reflect both the structure of the IAA and the Convention's allocation of responsibilities between Convention countries. The common objective of these standards, however, is to implement the goals of the Convention and the IAA of protecting participants in the adoption process and ensuring adoptions are conducted in the best interests of the child.

#### 1. U.S. Supervised Providers

The rule now requires that the primary provider ensure that other U.S. accredited agencies or approved persons providing adoption services in a case are complying with the standards applicable to U.S. supervised providers. That is, § 96.14(b) now requires that a primary provider treat all other agencies and persons it is using to provide adoption services in the United States on a case as supervised providers, regardless of their accreditation/approval status, unless the provider qualifies as an exempted provider or a domestic public authority.

We made this change to the proposed rule in response to expressed concerns about how an accrediting entity could evaluate the performance of an agency or person if, as primary provider, the agency or person was not required to supervise any accredited agencies or approved persons that it was using to provide adoption services in a particular case. If an accrediting entity finds that a primary provider has provided inadequate supervision and, as a result, the actions of an agency or person that the primary provider is using to provide services—whether accredited or approved or not—reveal non-compliance with the standards in these regulations applicable to the use of supervised providers, then the accrediting entity may take adverse action against the primary provider.

#### 2. Foreign Providers

Under the final rule, the primary provider must now treat all non-governmental foreign providers, including agencies, persons, or entities accredited by a Convention country, that it uses to provide adoption services as supervised providers consistent with § 96.46(a) and (b), unless the foreign provider performs a service qualifying for verification under § 96.46(c) (consents, child background studies and home studies). We believe that this approach accommodates our concerns, expressed in the preamble to the proposed rule, that primary providers would have practical difficulty supervising entities in another

Convention country. This approach was chosen to ensure that primary providers do not inappropriately rely on accreditation by a foreign Central Authority as a guarantee of conduct. It is consistent with the fact, recognized in this rule and the IAA, that accreditation and approval within the U.S. system cannot guarantee good conduct.

The verification requirement in § 96.46(c) recognizes, however, that as a practical matter, a primary provider will not be able to supervise contemporaneously all adoption services that might occur in a Convention country. A limited number of adoption services will generally have been performed in a Convention country before a U.S. primary provider has been identified: In an incoming case (child immigrating to the United States) the consents to adoption and child background study will often have been prepared before intercountry adoption to the United States is specifically contemplated; in an outgoing case (child emigrating from the United States) the home study will often have been prepared before the prospective adoptive parent(s) determine that they wish to pursue intercountry adoption from the United States.

To recognize these possibilities and to avoid requiring that such services are re-performed under supervision—that is, to avoid creating additional costs and delaying adoption placements, which could, in turn, disadvantage U.S. prospective adoptive parent(s) seeking to adopt abroad and children seeking placements—the rule adopts a different approach to the primary provider's oversight of these services. The standard set forth in § 96.46(c) requires the primary provider to verify that these three adoption services, when provided by private, non-governmental providers, were performed in the Convention country consistently with the requirements of the Convention and any other applicable local law. (In many countries all three of these services will be performed by public or competent authorities, for whom a primary provider is not required to be responsible.) The verification standard of § 96.46(c) will reinforce the protections in the Convention and U.S. law relevant to the performance of these three adoption services. (The Convention requires, for example, that all home and child background studies not prepared by a governmental authority be prepared under the responsibility of an accredited body, and that competent authorities of the state of origin ensure that consents meet Convention requirements. U.S. governmental authorities will also

address the issue of consent in determining visa eligibility.)

A primary provider will always have the option of treating providers of services that qualify for verification under the § 96.46(c) standard as supervised providers under § 96.46(a) and (b) instead, assuming that substantial compliance with those standards is feasible. This might occur, for example, if a primary provider has a long-standing supervisory relationship with a particular Convention country adoption service provider.

As was the case in the proposed rule, primary providers are not required to treat Central Authorities, or other foreign public authorities, as foreign supervised providers. This is consistent with the scope of the Department's authority, and the Convention's allocation of responsibilities.

#### B. Accreditation and Approval Standards

We received many comments on the proposed standards on insurance, social service personnel qualifications, blanket waivers of liability, and the primary provider's liability for its supervised providers. We want to explain revisions we have made to those standards in the final rule.

##### 1. Standard on Professional Liability Insurance

The IAA requires that the standards include an insurance standard. The proposed rule provided that an agency or person maintains insurance in a minimum amount of no less than \$1,000,000 per occurrence, annually. In the preamble to the proposed rule, we solicited comments on the insurance provision from insurance experts, actuaries, associations, and agencies and persons, and explicitly encouraged agencies and persons to have their insurance providers comment on this provision. We received a number of conflicting comments on the insurance provision, with some commenters opposing the inclusion of any standard, others stating that professional liability insurance is simply unavailable, and others maintaining that, even if professional liability insurance were available, the premiums would make it too costly for them to operate. Other commenters said insurance would be affordable and available.

In light of the conflicting public comment on this issue, the Department made good faith efforts to research further the issues of availability, feasibility, and costs of professional liability insurance for adoption service providers. The Department hired an insurance expert who contacted

adoption service providers, insurance brokers and agents, wholesalers, insurance industry service organizations and insurers. The report of the insurance expert (redacted of confidential business information), which helped inform the basis of the insurance requirement in the final rule, is now part of the public record and can be found at <http://www.travel.state.gov/family/adoption>.

The Department has determined that it is appropriate in §96.33(h) of the rule to set a standard of a minimum level of professional liability coverage in the amount of \$1 million in the aggregate, rather than per occurrence. This standard means that an adoption service provider should have, at a minimum, a policy that would make available \$1 million in coverage annually for all covered claims. We believe that this standard is sufficient to protect adoption service providers, children, and parents, and that the insurance market is likely to respond to this regulation by making such coverage available to adoption service providers. The rule continues to provide that this is a minimum standard; the agency or person will have to take into account whether its individual risk profile warrants additional professional liability coverage, or other types of insurance.

## 2. Social Service Personnel Qualifications

The proposed rule provided as a standard that supervisory social service personnel have a master's degree in social work (MSW) or master's degree in a related human service field (with some exceptions for those already working in the field). Non-supervisory social service personnel would have to hold an MSW or master's degree, or a bachelor's degree in addition to experience. The proposed rule also provided for individuals performing home studies or child background studies to have a minimum of an MSW or master's degree in a related human service field.

Most of the comments that we received strongly opposed any standard providing for social service personnel, other than those in supervisory positions, to have an MSW or master's degree. A number of comments indicated that finding qualified MSWs for low-paying positions available within nonprofit adoption agencies was next to impossible. Agencies and persons in rural, isolated areas expressed concern about the general lack of MSWs in non-urban locations. Commenters also indicated that experience with adoption practice

typically was a better prerequisite for handling intercountry adoption cases than holding an MSW.

In response to these comments we revised the standard in the final rule. The final rule, at §96.37, retains the qualifications for supervisory social service personnel in the proposed rule. Qualifications for non-supervisory social service personnel have been slightly modified to provide for an MSW, master's, or a bachelor's degree in any field and prior experience in family and children's services and adoption. We have eliminated entirely any provision that home study preparers or child background study preparers have an MSW or a master's degree in a related human service field.

## 3. Waivers of Liability

The proposed rule would have set a standard prohibiting adoption service providers from asking clients to sign blanket waivers of liability. Prospective adoptive parent(s) expressed concerns about being asked to sign broad waivers of liability as part of their contracts with agencies and persons. On the other hand, we were also told that waivers are common to the adoption field, particularly in the face of increasing litigation over the tort of wrongful adoption, and were given copies of sample waivers. Some commenters insisted that agencies and persons could not obtain affordable liability insurance unless their contracts with clients identified risks inherent to the adoption process and asked clients to assume those enumerated risks. Other commenters suggested that the Department provide a boilerplate waiver clause.

We concluded that a standard prohibiting blanket waivers is not warranted, and have revised the standard in §96.39(d) to permit an agency or person to include a waiver of liability, if consistent with applicable State law. This approach defers to the adoption service provider's own assessment of risks and benefits in asking a client to sign a waiver, and to State law, rather than imposing a Federal standard prohibiting waivers. To address the major concerns about extremely broad waivers that exempt all conduct, §96.39 provides that any such waivers comply with State law and additionally be limited and specific and based on risks that have been discussed and explained to the client in the adoption services contract.

## 4. Primary Provider Liability for Acts of Supervised Providers

The proposed rule included standards in §96.45(c) (Using supervised

providers in the United States) and §96.46(c) (Using providers in Convention countries) that would have provided for the primary provider to assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted adoption services and for maintenance of a bond, escrow account, or liability insurance to cover liability risks arising from the use of supervised providers.

Many commenters strongly opposed these provisions as impractical and unworkable, and some questioned the statutory basis behind them. In their view, a court should be allowed to allocate responsibility in any particular circumstance, and the Department should not attempt to allocate responsibility in the standard. Other commenters questioned the availability of the kind of insurance contemplated to cover the risk of using supervised providers, especially overseas. A number of commenters, including insurance providers and agents, said that insurance coverage for supervised providers would push the cost of adoption services beyond the reach of many potential prospective adoptive parents, while others said that such insurance would be affordable.

The final rule does not include these provisions, or related provisions on indemnification that were proposed at §§96.45(d) and 96.46(d). Primary providers may choose how to allocate risk with their contractual partners—that is, their supervised providers—within the framework of existing laws on liability. Under this rule, however, primary providers will still be held responsible for their supervision of supervised providers in the accrediting entity's assessment of whether they are providing adoption services in substantial compliance with this rule, the IAA, and the Convention.

## C. Complaint Registry

The provisions of the final rule related to the Complaint Registry differ from those that appeared in the proposed rule. The Department still intends to establish a Complaint Registry to support the accrediting entities in fulfilling their oversight responsibilities and the Department in its own oversight role. The Department at this time no longer intends, however, that the Complaint Registry will be an independent entity with which the Department will have an agreement. As reflected in subpart J on oversight through review of complaints, the Complaint Registry will be a system established by the Department to assist the accrediting entities and the

Department in their oversight functions. The Department's current operational plan is for the Complaint Registry to collect complaints and make them available to the appropriate accrediting entity for action. Accrediting entities will be required to establish written procedures for recording, investigating, and taking action on complaints referred to them through the Complaint Registry. Upon completion of an investigation, accrediting entities will have to provide written notification to the complainant and the Complaint Registry of its findings and any actions taken.

The Department will be able to review complaints and actions taken by the accrediting entity and take independent action if appropriate. The Complaint Registry will maintain records of complaints, track compliance with deadlines, generate reports, and perform other functions as the Secretary determines appropriate. We believe that subpart J provides adequate flexibility to assign additional functions to the Complaint Registry if experience with the system indicates that additional functions would be useful or necessary.

#### IV. Section-by-Section Discussion of Comments

This section provides a detailed discussion of comments received on the proposed rule, and describes changes made to the proposed rule. Two general points should be kept in mind in reading this discussion. First, we refer generally to actions of the "Department" pursuant to the rule. The rule itself refers to actions of the "Secretary," as the official named in the IAA, but the day-to-day exercise of the Secretary's functions has been delegated and will be exercised by other Department officials, primarily in the Bureau of Consular Affairs. (See § 96.2 of the rule, defining "Secretary.") Second, particularly while discussing the accreditation/approval standards of Subpart F, we frequently talk in terms of actions that agencies or persons "must" take and "requirements" they must meet. Readers should keep in mind, however, that the accreditation/approval model looks for "substantial compliance" with the standards. Thus, within the substantial compliance framework for accreditation that the IAA establishes, statements that actions are required mean that agencies or persons will have to take such actions in order to be judged in full compliance with the standard in question. The accrediting entities will be responsible for developing methods of assessing and weighting compliance with individual standards, subject to the Department's approval, to determine whether

accreditation, temporary accreditation, or approval can be granted and maintained.

#### Subpart A—General Provisions

Subpart A is organized in the same way as in the proposed rule, and includes § 96.1 (Purpose); § 96.2 (Definitions); and § 96.3 (Reserved).

The Department has made a number of changes to § 96.2 (Definitions), in response to public comment, which are described below. In addition, we have revised the definition of "approved home study" to clarify that a supervised provider could also complete a home study. We have changed the term "public body" to "public domestic authority" and the term "public authority" to "public foreign authority," without making a substantive change in the definitions, to make the distinction between the two terms, which is primarily geographic, more transparent. We also added language to the definition of "supervised provider" to clarify that the definition applies regardless of the local terminology used to refer to private providers, so long as the private individual or organization is providing adoption services under the supervision and responsibility of a primary provider, and to the definition of "exempted provider" to clarify that such providers are providing services within the United States.

#### Section 96.2—Definitions

1. *Comment:* One commenter recommends that the Department add a definition for "accreditation" to clarify that the regulations address accreditation only as it relates to Convention adoptions. The commenter requests that the Department specifically state that the regulations do not affect any voluntary accreditation process for non-Convention intercountry adoptions.

*Response:* These regulations do not affect any voluntary accreditation process for non-Convention intercountry adoptions. It is not necessary to add a definition of "accreditation" to § 96.2, however, because § 96.12 makes clear that agencies and persons need to be accredited or approved under these regulations only for purposes of Convention adoptions.

2. *Comment:* One commenter requests that the Department establish a definition of "adoptability" for U.S. adoptees who are placed internationally.

*Response:* Each U.S. State determines the criteria to use to determine if a child is eligible for adoption in that State. Because these regulations are not

intended to preempt State law on eligibility for adoption, we have not added a definition of "adoptability."

3. *Comment:* One commenter requests clarification as to whether the IAA definition of "adoption" is intended to create a Federal law definition of adoption. The commenter suggests that the Department define an "adoption," for the purposes of the regulations, as the judicial or administrative procedure that establishes a legal parent-child relationship for all purposes between a minor and an adult who is not already the minor's legal parent and that satisfies the requirements for the minor child's (i) immigration to the United States or (ii) emigration from the United States pursuant to the IAA and other relevant provisions of the INA and Federal law.

*Response:* The definition of adoption in the rule is applicable only under these regulations, in the context of the Convention and the IAA. The Department does not have authority under the IAA to create a Federal definition of adoption to be used outside of the context of the Convention and the IAA. Overall, the definition of adoption, for these regulations, is designed to provide guidance to agencies and persons on what constitutes an adoption for Convention purposes so that they can determine if they must be accredited or approved to provide adoption services in a particular case. The definition is also useful in distinguishing between "post-placement" and "post-adoption." In response to this comment, the Department is not creating a definition of adoption that will have any broader applicability but it is replacing the term "formal act" with the phrase, "the judicial or administrative act" in the definition of adoption. This change clarifies that the definition defers to State and Convention country choice of judicial or administrative procedures for adoption. The definition still requires that the legal relationship between a child and his or her former parents be terminated, but is not meant to affect informal relationships between a child and his or her former parents, such as those that develop from an open adoption, or any State law that allows a stepparent to adopt a child without terminating the parental rights of the stepparent's spouse, or any State law that grants an adopted child inheritance rights from a former parent even after a legal adoption.

4. *Comment:* Many commenters request that the Department clarify the difference between "post-placement monitoring" and "post-adoption services." Another commenter requests

that the Department explicitly state that “post-placement services” are services provided by exempted providers in connection with a Convention adoption. One commenter asks the Department to clarify whether providing assistance with U.S. immigrant visa processing is a post-adoption service or post-placement monitoring. There were conflicting comments as to whether or not “post-adoption services” include the provision of supportive services to adoptive families to promote the well-being of adoptees and families, the stability of adoptive placements, and the prevention of adoption disruption or dissolution as well as monitoring and reporting.

*Response:* Post-placement monitoring is an “adoption service” under the IAA. Because of this an adoption service provider must be accredited, temporarily accredited, approved, or operate as a supervised provider to provide post-placement monitoring in a Convention adoption case in the United States. Post-adoption services, however, are not adoption services under the IAA, and an agency or person would not have to comply with the accreditation/approval requirements to perform them in a Convention adoption case. To distinguish between post-placement monitoring and post-adoption services, the Department has added new definitions of “post-placement” and “post-adoption.” “Post-placement” is defined as the period of time after a grant of legal custody or guardianship of the child to the prospective adoptive parent(s) or to a custodian for the purpose of escorting the child to the identified prospective adoptive parent(s), and before an adoption. An example of “post-placement monitoring” (an adoption service) would be a pre-adoption home visit or report monitoring the child’s adjustment to the new pre-adoptive home. By contrast, “post-adoption” means after an adoption; in cases in which an adoption occurs in a Convention country and is followed by a re-adoption in the United States, it means after the adoption in the Convention country. Any of the following would be examples of a “post-adoption service,” if provided after the child’s adoption: providing mental and physical health services for the adopted child; providing assistance in filling out post-adoption reports required by certain Convention countries; and sponsoring support groups for adopted children or adoptive parents. The Department understands that there is also some confusion over which post-placement services are “adoption services.” “Post-placement monitoring”

is one of the enumerated “adoption services” in the IAA. Post-placement monitoring encompasses services related to evaluating the continuing fitness of the child’s adoptive placement. For example, monitoring how a child is adjusting to his or her new family or visiting the prospective adoptive parent(s) to ensure that they are able to care for the particular needs of the child and to determine whether the placement is still in the child’s best interests is post-placement monitoring.

If, on the other hand, the post-placement service is not related to the adoptive placement, then it is not the adoption service of “post-placement monitoring.” An agency or person is not performing a post-placement “adoption service,” for example, if it provides post-placement counseling to a family. Assisting with U.S. immigrant visa processing is not included in Section 3(3) of the IAA’s definition of “adoption services,” and is not an activity that is within the scope of these regulations.

5. *Comment:* Some commenters request that the Department add “post-adoption services” to the list of adoption services, and hence to the activities subject to these regulations. One commenter states that its members believe post-placement services, whether provided before or after legalization of an adoption, should be provided by qualified personnel. The commenter suggests a revision of the Department’s definition of “adoption services” to include providing required periodic reports to the child’s country of origin, or any other post-adoption services required by the child’s country of origin.

*Response:* Section 3(3) of the IAA, which defines adoption services, does not include post-adoption services as an adoption service. (In fact, while at least one draft of H.R. 2909, the bill that became the IAA, included post-adoption services in the definition of adoption services, post-adoption services were not included in the definition in the IAA as enacted.) Services provided after an adoption is dissolved are also not “adoption services,” as defined in the IAA, because they are provided after an adoption has occurred, so they are post-adoption services.

Some of the comments on this issue reflected a concern about ensuring compliance with post-adoption reporting requirements imposed by countries of origin, particularly if parents are unwilling to cooperate, or do not maintain contact with agencies and persons. The Department encourages agencies and persons involved in Convention adoptions to comply with all applicable post-adoption reporting

requirements. We note that countries of origin that require post-adoption reports may stop working with U.S. agencies and persons that cannot produce the post-adoption reports. While this is a potentially serious issue, it is not one that can be addressed through the accreditation process or these regulations.

6. *Comment:* Several commenters request more specific definitions addressing who can provide adoption services. They want to know if “adoption helpers” or “advisors” are covered. Another commenter requests that the Department’s definition of “adoption services” be revised to exclude simply assisting a country of origin’s public foreign authority. Another commenter requests that the Department define “adoption services” to include the services of “unlicensed facilitators”—individuals that essentially provide adoption services (like the preparation of adoption paperwork and the arrangement of child-matching services for parents in foreign countries).

*Response:* Whether the activities of an adoption service provider are subject to the accreditation/approval standards in this rule turns solely on whether the private individual or entity is providing a defined “adoption service,” and not on the identity of the private individual or entity, the term used to refer to the private individual or entity, or the entity on whose behalf the services are provided. If people who call themselves “adoption helpers” or “advisors” are performing in the United States any of the services enumerated in the adoption services definition, they must be accredited, temporarily accredited, approved or supervised, or exempted once the Convention goes into force for the United States. A primary provider must also ensure that, with respect to adoption services performed in a Convention country, any private individuals or entities it is using to perform adoption services in a Convention case—regardless of identity, the term used to refer to them, or on whose behalf the services are performed—are supervised, unless they are performing a service qualifying for verification under § 96.46(c). Examples of different adoption services, and instances in which providers of such services must be accredited, temporarily accredited, approved, supervised, or exempted, have been added to the regulation to help clarify this point in § 96.15 of subpart C.

7. *Comment:* One commenter requests that the Department clearly define “suspension” and “cancellation” as they relate to adverse actions against



accredited agencies and approved persons. Specifically, the commenter asks whether an accredited agency or approved person will have to transfer its adoption cases to another entity during a period of "suspension." The commenter requests that the Department replace the term "suspension" with "probation, with required corrective action" to clarify that the accredited agency or approved person does not have to transfer its cases while correcting noted problems.

*Response:* The Department has not substituted "probation, with required corrective action" for "suspension" because suspension is the term used in the list of adverse actions contained in § 202(b)(3) of the IAA. Nor have we added definitions of suspension and cancellation to subpart A, because the consequences of suspension and cancellation are adequately explained in subpart K. Section 96.77 of subpart K provides that the suspended agency or person must consult with the accrediting entity about whether or not a particular suspension requires that an agency or person to transfer all its Convention cases. Please see response to comment 1 on § 96.75 for further information.

8. *Comment:* Several commenters request that the Department elaborate on the definition of "child welfare services." They note that providers of these services are exempt from the accreditation/approval process. One commenter requests that the Department provide more specific examples of providing child welfare services. Another commenter asks whether the definition is limited only to services provided by public child welfare agencies or whether it also includes broader services such as after-school activities, YMCA programs, or summer respite.

*Response:* "Child welfare services" are defined in § 96.2 as services, "other than those defined as "adoption services," which are designed to "promote and protect the well-being of a family or child." Thus, when attempting to decide what constitutes a "child welfare service," it is necessary first to determine if the service is an "adoption service." If not, then the service could be a "child welfare service." Some examples of child welfare services are: providing mental or physical health services for adoptive parents or adoptees; promoting adoption through general programs, but not providing adoption services in specific cases; conducting support groups for adoptive parents or adoptees; and providing temporary foster care for children who are awaiting adoption.

These examples are not an exhaustive list of "child welfare services." The definition of "child welfare services" is not limited to public child welfare agencies. Private organizations, such as the YMCA, are exempt from the accreditation/approval process if they only provide services for children or parents that are not adoption services.

9. *Comment:* One commenter seeks clarity for the definition of "exempted provider."

*Response:* "Exempted providers" and "exempted activities" are explained in more detail in the subpart C of this final rule. We have changed the definition of "exempted provider" to clarify that a social work professional or an organization may perform a home study or a child background study (or both) in the United States in a Convention adoption, as an exempted provider, as long as the social work professional or organization is not currently providing and has not previously provided any other adoption service in the same case. The definition is consistent with § 96.13 of subpart C. See responses to comments 1 and 2 in § 96.13.

10. *Comment:* Several commenters recommend that the regulations define what constitutes a complaint, so that the number of frivolous complaints will be limited. Several commenters also recommend that the word "complaint" be changed to the word "grievance," in order to signify a more formal concern, and offer definitions of grievance. Several commenters also recommend that the regulations require complaints to be filed in writing. One commenter further requests that the regulations be amended to reflect that anonymous complaints may not be filed.

*Response:* We have not added a definition of complaint, but have made other changes to the final rule to respond to the concerns expressed, in the definition of "Complaint Registry," in § 96.41, and in subpart J. Section 96.41 now makes clear that complaints must be signed and dated to be lodged with an agency or person, and must refer to activities or services that the complainant believes raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA. Subpart J similarly now makes clear that complaints that may be filed through the Complaint Registry are written documents submitted by a complainant that concern an accredited agency or approved persons (including their use of supervised providers), and that raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA. An agency or person's response to other kinds of "complaints" will not be

relevant to the accreditation/approval process.

11. *Comment:* Some commenters question how the Complaint Registry will be established.

*Response:* The Department has modified the definition of "Complaint Registry" (§ 96.2) to make it clear that it will be a system created by the Department intended to receive, distribute, and monitor complaints relevant to the accreditation or approval status of agencies and persons. The functions of the Complaint Registry are addressed in § 96.70 of subpart J.

12. *Comment:* Commenters suggest that the Department add a definition of the term "displacement" to § 96.2, defining displacement as the placement of an adoptee in an out-of-home care environment without terminating parental rights, for example, so that the child may receive, for example, mental health in-patient treatment.

*Response:* Because the commenters describe as "displacement" would occur post-adoption, and thus would fall outside the scope of these regulations, we have not added a definition of displacement to the rule.

13. *Comment:* Several commenters request clarification or revision of the definitions of "dissolution" and "disruption" in § 96.2. One commenter suggests that the Department and Congress (in the IAA) reversed the meaning of these terms. Another commenter requests that the definitions of "disruption" and "dissolution" be revised to state explicitly that a disruption or dissolution must be included in the overall statistics of adoption failures only if it occurs while an adoptee is physically residing with a family in their home at the time of the disruption or dissolution. Similarly, another commenter is concerned that the Department's definition of "disruption" is too broad and could force agencies and persons to generate reports in cases in which the disruption had benign causes. One commenter suggests that the definition of "disruption" should be revised to address more specifically the "disruptions that occur after a child has left his or her country of origin." A commenter suggests the following definitions: "'Disruption' means adoptive placement that does not finalize in an adoption. 'Dissolution' means dissolving the adoptive placement through termination of parental rights."

*Response:* In defining "disruption" to refer to an interrupted adoptive placement, the Department followed § 104(b)(3) of the IAA, which used "disruption" in the same manner. We

also believe that the majority of people involved with intercountry adoptions use the terms “disruption” and “dissolution” as we have defined them. Therefore, the Department is not changing the definitions of “disruption” and “dissolution” to, in effect, reverse them.

The Department has, however, revised the definition of “disruption” and has modified related definitions and reporting requirements, to clarify when a “disruption” will need to be reported. “Disruption” is now defined to mean the interruption of a placement for adoption during the “post-placement” period. “Post-placement” now is defined so that a “disruption” will need to be reported only when it takes place after legal custody or guardianship of the child has been transferred to the prospective adoptive parent(s) or a custodian for transport to the prospective adoptive parent(s), but before the adoption is completed. Thus, an agency or person would not need to report a “disruption” if a prospective adoptive family decided not to pursue an adoption during an informal placement pending transfer of legal custody of the child. On the other hand, a “disruption” would need to be reported if it happened after legal custody or guardianship of the child was transferred, even if the child had not yet left his or her country of origin.

We have also modified the definition of “dissolution” to reflect the addition to § 96.2 of a definition of “post-adoption,” and to respond to the suggestion that we make specific reference to termination of parental rights. The final rule defines “dissolution” to be the termination of the adoptive parent(s)’ parental rights after an adoption.

14. *Comment:* One commenter requests that the Department add to § 96.2 a definition of a foreign Convention “accredited body.” Another commenter similarly suggests adding a definition for “foreign partner providers”—entities accredited or approved by a Convention country and providing one or more adoption services in a Convention case. The commenter also recommends defining “foreign governmental partner providers,” as public authorities of a Convention country (excluding courts) providing one or more adoption services in a Convention case.

*Response:* The Department believes that it is unnecessary to add a definition for foreign accredited bodies or “foreign partner providers.” Subpart C explains when foreign providers accredited by a Convention country must operate under the supervision and responsibility of a

primary provider. Please see response to comment 1 for § 96.14. We also believe that the definitions of “public foreign authority” and “competent authority” are adequate to refer to public authorities of Convention countries.

15. *Comment:* A commenter requests that the Department make clear, in the definition of “legal services,” that it is not regulating the actions of foreign attorneys. The commenter also cautions the Department that it cannot regulate attorneys licensed in the United States because they are regulated by the States. Thus, the commenter believes that the Department is incorrect when it asserts (in the preamble to the proposed rule) that a lawyer who secures necessary consents to the termination of parental rights and to adoptions in Convention cases must be approved or must secure the consents as part of, or under the supervision and responsibility of, an accredited agency, temporarily accredited agency, or an approved person.

*Response:* The IAA and these regulations are not intended to preempt State laws regarding licensing of attorneys; on the other hand, under the IAA, persons, including lawyers, who provide adoption services in the United States, as opposed to legal services, must comply with the IAA. Section 201(b)(3) of the IAA states that the provision of legal services by a person “who is not providing any adoption service in the case” is exempt from the accreditation/approval requirements. The exemption does not apply, however, if the attorney is providing (non-exempt) adoption services in the case. An adoption service, as defined in the IAA, provided by a U.S. attorney, or through a U.S. accredited/approved provider’s use of the services of a foreign attorney, in connection with a Convention case would need to be provided in compliance with any applicable requirements of the IAA and these regulations, regardless of any professional standards or licensing or other laws that would also govern the actions of the attorney. We note, however, that the rule would allow a primary provider to treat a foreign attorney that provided only the adoption service of obtaining consents in a Convention country as either a supervised provider, consistent with §§ 96.45(a) and (b), or as performing a service qualifying for verification under § 96.46(c)).

#### **Subpart B—Selection, Designation, and Duties of Accrediting Entities**

Subpart B is organized in the same way as in the proposed rule, and includes § 96.4 (Designation of

accrediting entities by the Secretary); § 96.5 (Requirement that accrediting entity be a nonprofit or public entity); § 96.6 (Performance criteria for designation as an accrediting entity); § 96.7 (Authorities and responsibilities of an accrediting entity); § 96.8 (Fees charged by accrediting entities); § 96.9 (Agreement between the Secretary and the accrediting entity); § 96.10 (Suspension or cancellation of the designation of an accrediting entity by the Secretary); and § 96.11 (Reserved).

We have made a number of changes to this subpart in response to public comment, including changes to §§ 96.6, 96.7, and 96.10, which are discussed below. We also deleted from § 96.4(a) material on soliciting accrediting entities that is no longer relevant and made additional clarifying corrections to § 96.4(a), to make plain that accrediting entities will be designated by the Department in an agreement that will also govern operations of the accrediting entity. Finally, we made conforming changes to § 96.7(b), to ensure consistency with changes made to the definition of Complaint Registry in § 96.2 and to subpart J.

#### *Section 96.4—Designation of Accrediting Entities by the Secretary*

1. *Comment:* Several commenters are concerned that having too few accrediting entities will create a monopoly, with accrediting entities charging exorbitant accrediting fees and possibly putting smaller agencies out of business. Other commenters encourage the Department to limit the number of accrediting entities to avoid accrediting entities competing for the business of the very people they are supposed to be regulating.

*Response:* Section 202(a)(1) of the IAA states that the “Secretary shall enter into agreements with *one or more* qualified entities” that will perform the duties of an accrediting entity (emphasis added). The IAA permits public entities to act as accrediting entities in part to increase the number of possible accrediting entities. (See IAA section 202(a)(2)(B)). The Department has used extensive outreach efforts to solicit a broad pool of interested parties to apply to become accrediting entities. We will not know the actual, final number of accrediting entities until we are able to enter into agreements with qualified applicants, but it is clear the number will be small, at least initially. There is no reason at this time to limit the number by regulation. The quality and fairness of the accrediting entities will not be addressed by the number of such entities but by the Department designating accrediting entities that are

qualified under the IAA and that meet the criteria established in these regulations and through the Department's ongoing oversight, including its oversight of accreditation fees, which under the IAA and these regulations may not exceed the costs of accreditation.

2. *Comment:* Some commenters are concerned that the Department did not provide public entities enough time or information to allow them to submit Statements of Interest to become accrediting entities. These commenters suggest that the Department should individually contact all public entities that do adoption licensing and invite them to apply. Similarly, many commenters want the regulations to mandate that every State licensing authority act as an accrediting entity for Convention purposes.

*Response:* The IAA does not authorize the Department to require all qualified public entities to become accrediting entities, but the Department did contact each relevant State authority and encourage it to apply to become an accrediting entity. The Department expects to provide additional open application periods for public entities or private nonprofit entities to apply to become accrediting entities at a future time.

3. *Comment:* Commenters believe that the Department should not delegate the function of accrediting agencies and approving persons to accrediting entities. These commenters suggest that the Department should act as the single accrediting entity for all agencies and persons, in order to bring uniformity to the application of accrediting standards and promote an emphasis on the best interests of the children.

*Response:* The IAA requires that the Department enter into agreements with qualified public entities or qualified nonprofit organizations to be accrediting entities. The Department cannot act directly as an accrediting entity.

4. *Comment:* Several commenters recommend that the Department, rather than an accrediting entity, investigate allegations of improper conduct involving agencies and persons overseas.

*Response:* Under the IAA, accrediting entities are given primary responsibility for overseeing the conduct of the agencies and persons they accredit or approve. As explained in the response to comment 1 on § 96.6, below, the accrediting entity will be responsible for monitoring agencies it accredits or temporarily accredits and persons it approves, including by monitoring their use of all supervised providers, including foreign supervised providers.

The Department is required to take the direct action of suspension or cancellation against an accredited agency or approved person only if the accrediting entity has failed or refused, after consultation with the Department, to take appropriate enforcement action itself.

5. *Comment:* Some commenters request that the Department prohibit current State licensing authorities from becoming accrediting entities. One commenter suggests that these public domestic authorities have not been responsive in the past to the concerns of adopting parents. A commenter also asserts that the IAA was enacted in part because States were unable to regulate adoption effectively, and apparently is concerned that state licensing authorities that are accrediting entities will assert sovereign immunity, or in any event will not accord "consumers" sufficient "due process." This commenter seems to contemplate suits against accrediting entities by "consumers" rather than the kind of judicial review of adverse action specifically addressed by the IAA.

*Response:* As stated above, the IAA permits qualified public entities to become accrediting entities and the Department intends to consider qualified public entities as potential accrediting entities. The Department believes the commenters' concerns about the likely responsiveness of public entities will be addressed by the Department designating public entities as accrediting entities only if they demonstrate that they are qualified under the IAA and can meet the criteria established in these regulations. The Department will also maintain ongoing oversight of all accrediting entities. In particular, the Department's agreements with the accrediting entities, which will be published in the **Federal Register**, will address accountability of the accrediting entities to the Secretary. Also, in this regard, the public will be able to complain about the performance of any accrediting entity to the Department, and the Department will be able to suspend or cancel the designation of any accrediting entity, as set forth in § 96.10 of the rule. As well, subpart J ensures that the Department will be able to oversee the performance of all accrediting entities in resolving complaints against adoption service providers. As for the concern about sovereign immunity and the "due process" rights of "consumers," nothing in these regulations is intended to create rights vis-à-vis any accrediting entity, whether public or private nonprofit. Consistent with this, we have made clear in § 96.12, as discussed in the

response to comment 7 on this section, below, that the conferral of accreditation or approval does not make an accrediting entity responsible for any acts of any entity providing services in connection with a Convention adoption and does not guarantee that in any specific case an accredited agency or approved person is providing adoption services consistently with the Convention, the IAA, the regulations implementing the IAA, or any other applicable law.

6. *Comment:* Commenters recommend that the Department add a mechanism for the public to challenge a decision by the Department to designate or not designate a public domestic authority or nonprofit organization as an accrediting entity.

*Response:* The Department's selection of accrediting entities is committed to the Department's discretion. Moreover, section 504 of the IAA provides that the Convention and the IAA shall not be construed to create a private right of action to seek administrative or judicial relief, except to the extent expressly provided in the IAA. Once the Department has signed an agreement with an accrediting entity, however, anyone will be able to submit a complaint regarding an accrediting entity directly to the Department. Section 96.10(a) of these regulations requires that such complaints be considered in determining whether an accrediting entity's designation should be suspended or canceled.

7. *Comment:* Potential accrediting entities suggest that the Department add a provision to § 96.4 to limit the liability of accrediting entities. Without such a provision, potential accrediting entities have suggested that it will be difficult to hire or retain evaluators/peer reviewers and that the fees for accreditation will be significantly higher to cover the risk of third-party litigation.

*Response:* The Department never intended that accrediting entities be responsible for third-party tort claims, and does not believe that the IAA suggests that they should be. While we have not revised § 96.4, we have added language to § 96.12 to underscore that conferral and maintenance of accreditation, temporary accreditation, or approval is not tantamount to a guarantee that adoption services in specific cases are performed consistently with the Convention, the IAA, the regulations implementing the IAA, or any other applicable law but rather establishes only that the accrediting entity has concluded that the agency or person provides services in substantial compliance with the

applicable standards set forth in this part.

8. *Comment:* Two commenters suggest that an agency, person, or other interested party should have the opportunity to file a complaint against an accrediting entity or to challenge the accrediting entity's interpretation of a regulation or law.

*Response:* The Department will accept and collect complaints against accrediting entities pursuant to § 96.10(a). (The Department intends to post on its website instructions for how to submit a complaint against an accrediting entity.) As part of its ongoing oversight responsibility, the Department will investigate and consider any complaints against an accrediting entity when determining whether an accrediting entity's designation should be suspended or cancelled. Please note that the accrediting entities are responsible for investigating complaints against agencies and persons.

Section 202(c)(3) of the IAA allows an agency or person that has been the subject of an adverse action by any accrediting entity to seek Federal court review to have the adverse action set aside. For a description of the accrediting entity's role with regard to terminating adverse actions, see the responses to comment 1 for § 96.78 and comment 1 for § 96.79.

*Section 96.5—Requirement that Accrediting Entity be a Nonprofit or Public Entity*

1. *Comment:* Some commenters believe that the current language of § 96.5 implies that only existing organizations can become accrediting entities (which will only exacerbate the potential for a monopoly of accrediting entities). These commenters note that § 96.5 states that an accrediting entity must "qualify" as either a nonprofit organization or a public entity. They have asked for clarification that, in the future, accreditation will be open to new organizations as well. They also propose the following language: "An accrediting entity must qualify as \* \* \*

(a) an organization or proposed organization described in section 501(c)(3) of the Internal Revenue Code of 1986."

*Response:* The Department does not believe there is a need for new language to cover "proposed" accrediting entities. Although the first application period for those interested in becoming accrediting entities closed on April 30, 2004, there will be opportunities in the future for another round of applications. At that time, any public entities and nonprofits that express interest in becoming

accrediting entities will have the opportunity to demonstrate that they meet the IAA criteria and that they have the capacity to perform the duties of an accrediting entity.

2. *Comment:* One commenter suggests that § 96.5(a) should be removed because there is no advantage to restricting for-profit entities from being accrediting entities.

*Response:* The Department is retaining § 96.5(a); its requirements come directly from § 202(a) of the IAA, under which for-profit private entities are not qualified to be accrediting entities.

*Section 96.6—Performance Criteria for Designation as an Accrediting Entity*

1. *Comment:* One commenter recommends that the Department modify the rule to require an accrediting entity to demonstrate that it has the ability to monitor the performance of accredited agencies and approved persons and their supervised providers.

*Response:* Section § 96.6(c) already required the accrediting entity to demonstrate to the Department that it can monitor the performance of accredited agencies, temporarily accredited agencies, and approved persons. In addition, the Department has modified §§ 96.6(c) and 96.7(a)(4) to make it explicit that accrediting entities must demonstrate that they are capable of monitoring a primary provider's use of supervised providers. We are aware that public entities and nonprofits designated as accrediting entities will likely have limited capacity to investigate overseas conduct directly, but we still expect them to use all reasonable means available to them of evaluating an accredited agency's or approved person's use of a supervised provider overseas. Such means would include, but not be limited to, document review and interviews to check that the agency or person is complying with the requirements of § 96.45 for using supervised providers in the United States and of § 96.46 for using supervised providers in Convention countries.

2. *Comment:* A commenter recommends that the Department revise § 96.6(f) insofar as it requires an accrediting entity that is not a public entity to demonstrate that it operates independently of any organization that includes agencies or persons that provide adoption services, noting that membership associations have played a valuable role in the development and support of accrediting entities. The commenter suggests that this section instead permit an accrediting entity to demonstrate that membership

organizations will not have inappropriate influence on an accrediting entity, and that the accrediting entity has conflict-of-interest policies to address its relationships with membership organizations.

*Response:* We have not made the suggested change to § 96.6(f), but we have added a new § 96.6(i) providing that the accrediting entity must prohibit conflicts of interest with any agency, person, or membership organization that includes agencies or persons. With this addition it should be clear that § 96.6(f) does not bar accrediting entities that are not public entities from being associated with membership organizations, which we have been told can play a valuable role in helping to identify and maintain best practices within the field of adoption. At the same time, it is critical that accrediting entities be neutral and objective in evaluating agencies and persons and avoid the appearance of partiality. Potential problems may be avoided if accrediting entities operate independently of membership organizations with which they are associated and that include agencies or persons that provide adoption services. When the Department addresses conflict-of-interest issues in the agreements with the accrediting entities under § 96.6(h), it may include specific safeguards for accrediting entities' involvement with such membership organizations.

3. *Comment:* Some commenters ask that the Department expand the conflict-of-interest provisions of § 96.6(h) and set conflict-of-interest prohibitions through rulemaking. Another commenter requests that the Department specifically forbid any board member or employee who works with or for an agency or person or that is related to an agency or person from serving as a board member or employee of an accrediting entity. Another commenter suggests that the conflict-of-interest provisions should prohibit employees of accrediting entities or volunteer evaluators from becoming employed by an adoption service provider for at least one year after participating in any accreditation service for that provider.

*Response:* In response to these comments, the Department has modified the final rule to include two new conflict-of-interest provisions. First, we have added § 96.6(i) to require that an accrediting entity demonstrate that it prohibits conflicts of interest with agencies or persons or with any membership organization that includes agencies or persons. Second, we added § 96.6(j) to require accrediting entities to demonstrate that they prohibit individuals directly involved with the

site evaluation of a particular agency or person from becoming employees or supervised providers of that same agency or person for at least one year. Consistent with section 202(a)(1) of the IAA, the Department may establish other appropriate conflict-of-interest rules in the agreements with accrediting entities.

*Section 96.7—Authorities and Responsibilities of an Accrediting Agency*

1. *Comment:* One commenter suggests that the Department should require that accrediting entities investigate and respond to complaints about the supervised providers of accredited agencies and approved persons.

*Response:* As described in subpart J of these rules, the Complaint Registry will refer complaints about accredited agencies and approved persons to an accrediting entity. If a complaint involves conduct of a supervised provider, the accrediting entity will need to check whether the accredited agency or approved person that is acting as the primary provider has provided adequate supervision of its supervised providers. If an accredited agency or approved person does not provide adequate supervision of its supervised providers, it will be out of compliance with the standards in §§ 96.45 and 96.46 related to use of supervised providers. The accrediting entity may, if the complaint is supported, take adverse action against an accredited agency or approved person for reasons related to its use of a supervised provider. Section 96.71 requires accrediting entities to establish written procedures, including deadlines, for recording, investigating, and acting upon such complaints.

2. *Comment:* A commenter recommends that the Department add a statement to § 96.7(a)(7) to clarify that accrediting entities are permitted to report information relating to suspected child abuse to responsible State authorities.

*Response:* The Department does not believe it is necessary to add such language. Nothing in § 96.7(a) prevents an accrediting entity from reporting suspected child abuse to the appropriate State authorities, and this section does not change State laws regarding mandatory reporting of suspected child abuse. Furthermore, § 96.72(b)(3) requires an accrediting entity, after consultation with the Department, to refer to law enforcement authorities any substantiated complaints that involve conduct that is in violation of Federal, State, or local law.

3. *Comment:* Two commenters object to § 96.7(a)(8), on transfer of Convention

cases, and ask that it be removed from the regulations. One of the commenters believes that this requirement puts accrediting entities in the awkward position of having to choose, or make recommendations regarding, which agencies and persons should be assigned the Convention cases that need to be transferred. The other commenter believes that it is essential for an accrediting entity to transfer Convention cases pursuant to § 96.7(a)(8), but recommends that the Department develop specific criteria for the selection of organizations to accept the transfer of these cases.

*Response:* We have modified § 96.7 (and provisions in subparts K, L, and N) so that accrediting entities are responsible for assisting the Department in taking appropriate action to help the agency or person transfer its Convention cases and adoption records. We now require in §§ 96.33(e) and 96.42(d) that agencies and persons have a plan to transfer their Convention cases and adoption records in the event that they become unable to continue performing Convention adoptions. If an agency's or person's plan fails, § 96.77(c) now requires accrediting entities to advise the Department, which, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the Convention cases and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate. Corresponding comments were made to §§ 96.87 and 96.109.

*Section 96.8—Fees Charged by Accrediting Entities*

1. *Comment:* One commenter requests, for reasons of fairness, that the Department add a provision to the rules that mandates that fees for accrediting services will be uniform across geographic and jurisdictional boundaries. On the other hand, another commenter supports the Department's decision to permit fees to vary based on the relative size, geographic location, and volume of Convention cases of an accredited agency or approved person. Two other commenters express concern about the cost of accreditation.

*Response:* Section 202(d) of the IAA requires that, in approving the fees set by an accrediting entity, the Department "consider the relative size of, the geographic location of, and the number of Convention adoption cases managed by the agencies or persons subject to accreditation or approval by the accrediting entity." Therefore, the Department does not have the discretion

to ignore these factors when approving fees. In addition, while fees may not exceed the costs of accreditation, it is possible that some public entities that are designated as accrediting entities may choose to subsidize the cost of accreditation in their States, creating additional possible variance in fees. The Department will review and approve accrediting entity fee schedules for compliance with the IAA's requirements. Approved fee schedules will be publicly available, which should allow comparison of fees.

2. *Comment:* Several commenters suggest that it is difficult to comment on the fee provisions of the regulations because the Department did not provide a fee schedule or an estimate of the accreditation fees.

*Response:* This regulation does not address the actual fees of the accrediting entities, which are not subject to rulemaking, but only the factors the Department will consider in deciding whether to approve fee schedules that the accrediting entities propose. The regulation closely tracks the statute, leaving the Department flexibility to approve or disapprove proposed fees in light of the IAA's requirements. Given the wide range of possible fee structures and the start-up nature of the accreditation process, it is not practicable to further regulate on this issue at this time. Nor can the Department predict what the actual approved fees will be after the proposed fees are reviewed in light of the statutory and regulatory criteria.

3. *Comment:* A commenter suggests that § 96.8(d), which states "[n]othing in this section shall be construed to provide a private right of action to challenge any fee charged by an accrediting entity" was the equivalent of "taxation without representation."

*Response:* We have retained § 96.8(d) because it is consistent with section 504 of the IAA, which prohibits inferring private rights of action under the IAA and the Convention, except as provided by the IAA.

4. *Comment:* A commenter is concerned that, while the regulations require accrediting entities to investigate complaints about accredited agencies and approved persons, they provide for the allowable fees for such investigatory services to be predetermined and published in the fee schedule pursuant to § 96.8, the implication being that the fees may prove inadequate to support the necessary investigation. The commenter suggests that the Department remove the responsibility for investigating accredited agency and approved person

wrongdoing from accrediting entities and retain that responsibility for itself.

*Response:* The IAA requires that accrediting entities investigate and review complaints against the agencies and persons that they accredit or approve. Under section 204(b) of the IAA, the Department is only required to take adverse action against an agency or person if it finds that the accrediting entity has failed or refused, after consultation with the Department, to take appropriate enforcement action. Accrediting entities are supposed to incorporate anticipated costs, including the costs of complaint review and investigations and routine oversight and enforcement, into their proposed fees. When the Department approves fees, we plan to ensure that the accrediting entity has budgeted for such expenses. In addition, § 96.8(b)(2) provides that “separate fees based on actual costs incurred may be charged for the travel and maintenance of evaluators.” If an accrediting entity finds that its actual expenses are far greater than it had anticipated in creating its fee schedules, and its fees are not sufficient to cover its operating expenses, it may apply to the Department to change its fee schedule.

5. *Comment:* A commenter recommends that the Department allow accrediting entities to revise their fee schedules from time to time with the approval of the Department.

*Response:* Pursuant to § 96.8(a), accrediting entities may propose changes to an approved fee schedule, subject to approval by the Department. Upon approval, the modified fee schedule will be made available to the public.

6. *Comment:* A commenter thinks that the Complaint Registry should be funded through a portion of accrediting fees or by the Department. The commenter also believes that applicants for accreditation should pay a single, non-refundable fee for pre- and post-accreditation/approval work. The commenter requests, however, that the Department clarify that public bodies, such as State licensing authorities, are permitted to charge similar accrediting fees.

*Response:* Under this final rule, the Department retains the discretion to determine how to fund the Complaint Registry, including through fees collected by the accrediting entities and/or by the Department. Section 96.8 explains the costs which may be included in any fee for accreditation and approval, including costs for complaint review and investigation and routine oversight and enforcement, and requires any such fee to be non-refundable. The fee provisions apply to

any accrediting entity, including a public entity that has authority under State law to collect accrediting fees.

#### *Section 96.9—Agreement Between the Secretary and the Accrediting Entity*

1. *Comment:* A commenter states that there must be a mechanism in the regulations to ensure consistent interpretations of the Convention, the IAA, and the Department’s regulations by accrediting entities across geographic regions. The commenter requests that the Department outline uniform standards in the regulations.

*Response:* These regulations do create uniform accreditation standards and procedures for all accrediting entities. The criteria to be used by all accrediting entities are listed in subpart F (and with regard to temporarily accredited agencies in subpart N). The procedures applicable to the accreditation process are provided in subparts D through N, excluding F. The Department, in its oversight and monitoring role, will ensure that all accrediting entities adhere to these uniform standards and procedures. Please also see the response to comment 1 on § 96.66.

2. *Comment:* A commenter states that the Department should submit all matters listed in § 96.9 to a notice and comment period instead of setting them by agreement. The commenter states that these subjects are or may be crucial, and require an opportunity for public comment. The commenter further believes that it is unlikely that the regulations will be upheld in court unless the Department submits these matters to notice and comment.

*Response:* Section 202(a) of the IAA requires the Department to enter into agreements with one or more qualified accrediting entities under which such entities will perform certain duties in accordance with the Convention, the IAA, and these regulations. While the IAA requires that the standards to be used by the accrediting entities to accredit or approve agencies or persons to provide adoption services in Convention cases be set by regulation, it does not require that the Department’s agreements designating accrediting entities be subject to public comment—such a requirement would be unworkable. Nonetheless, the Department will publish the final agreements in the **Federal Register**.

#### *Section 96.10—Suspension or Cancellation of the Designation of an Accrediting Entity by the Secretary*

1. *Comment:* A commenter asks how the Department will determine whether accrediting entities are in substantial compliance with the regulations. The

commenter also requests clarification on how accrediting entities will be given notice of any complaints or concerns that may arise so that they have an opportunity to respond to the concerns and to correct any deficiencies.

*Response:* The Department has added § 96.10(b), which requires the Department to notify an accrediting entity in writing of any deficiencies in the accrediting entity’s performance that could lead to the cancellation or suspension of its designation as an accrediting entity. The accrediting entity will be given an opportunity to demonstrate that suspension or cancellation is unwarranted, in accordance with mutually agreed upon procedures for handling complaints against the accrediting entity established in the agreement between the Department and the accrediting entity described in § 96.9. Section 96.10(c) now lists the factors that the Department will consider to determine whether an accrediting entity is substantially in compliance with these regulations, the IAA, and the Convention.

2. *Comment:* A commenter asks whether accrediting entities will be able to appeal any adverse decision by the Department regarding cancellation or suspension without having to go to court.

*Response:* Under section 204(d) of the IAA, an accrediting entity that is the subject of a final action of suspension or cancellation may petition the United States District Court for the District of Columbia or the United States District court in the judicial district in which the accrediting entity is located to set aside the action by the Department. The IAA does not provide for administrative review of cancellation or suspension of an accrediting entity by the Department. Section 96.10(b) of the rule now provides, however, that prior to the action being taken, an accrediting entity will be given an opportunity to demonstrate to the Department that suspension or cancellation would be unwarranted.

#### **Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services**

Subpart C is organized the same way as in the proposed rule, except that the Department has added a new § 96.15 (Examples) and consequently renumbered § 96.15 (Public domestic authorities) and § 96.16 (Effective date of accreditation and approval requirements) as §§ 96.16 and 96.17 respectively. Subpart C also contains § 96.12 (Authorized adoption service providers); § 96.13 (Circumstances in

which accreditation, approval, or supervision is not required); and § 96.14 (Providing adoption services using other providers).

The Department made a number of changes to this subpart in response to public comments, including changes to §§ 96.12, 96.13, 96.14 and 96.15. As discussed above in addressing § 96.4 comment 7, the Department has added a new § 96.12(c) to underscore that conferral and maintenance of accreditation, temporary accreditation, or approval is not tantamount to a guarantee that adoption services in specific cases are performed consistently with the Convention, the IAA, the regulations implementing the IAA, or any other applicable laws, but rather establishes only that the accrediting entity has concluded that the agency or person conducts adoption services in substantial compliance with the applicable standards set forth in this part. Section 96.13 has also been revised to clarify that, like § 96.12, it addresses services being provided in the United States in connection with a Convention adoption.

As discussed in section III, subsection A of the preamble, above, § 96.14 of the final rule differs from the proposed rule in its treatment of the responsibilities of a primary provider with respect to its use of other providers of adoption services in the United States and in Convention countries. The Department has revised § 96.14(b) and § 96.14(d) to require that, except as otherwise provided, in providing adoption services in the United States for a Convention case, a primary provider must treat other accredited agencies, temporarily accredited agencies, and approved persons as supervised providers under its responsibility and supervision. The response to comment 1 on § 96.14, below, discusses similar changes to § 96.14(c), the result of which is generally to require a primary provider to treat all non-governmental foreign providers as supervised providers, consistent with the standards in §§ 96.46(a) and (b), regardless of whether accredited by a Convention country, with a limited exception. The exception is provided for in § 96.14(c)(3), which allows a primary provider to use any foreign provider in a Convention country to obtain consents or perform a child background study in an incoming case, or to perform a home study in an outgoing case, so long as the primary provider verifies the provision of the service, in accordance with the standards set out in § 96.46(c).

#### *Section 96.12—Authorized Adoption Service Providers*

1. *Comment:* A commenter asks what will happen to intercountry adoption cases already in progress once the Convention enters into force.

*Response:* We have modified § 96.12(a) to make explicit reference to section 505(b) of the IAA and to clarify that cases in progress are not within the scope of this rule. Section 505 of the IAA establishes how entry into force of the Convention for the United States will affect cases in progress (so-called “pipeline cases”). In general, adoption cases that are initiated, either in the United States or in a Convention country, before the entry into force of the Convention for the United States will not be treated as Convention cases subject to the IAA. If any further transition rules prove to be necessary, the Department will consider undertaking an additional rulemaking procedure.

2. *Comment:* Commenters ask if an agency or person will need to be accredited/approved if they handle adoptions from a country whose ratification or accession to the Convention has not been recognized by the United States. A commenter requests that the Department clarify when an agency or person will be required to be accredited or approved if they are handling intercountry adoption cases involving a country that is in the process of ratifying the Convention.

*Response:* Once the Convention has entered into force for the United States, an agency or person operating in the United States needs to be accredited, temporarily accredited, approved, or supervised or exempted only if it is performing adoption services in a Convention adoption. An adoption will not be considered a Convention adoption unless the Convention has entered into force between the United States and the other country involved. The Convention will not be in force between the United States and the other country if the other country has not yet ratified, approved, or acceded to the Convention, or if the United States does not recognize another country's accession to the Convention, as permitted by Article 44 of the Convention in certain circumstances.

With respect to the question of when agencies and persons handling intercountry adoptions will need to be accredited or approved to handle adoptions from countries whose subsequent ratification, approval, or accession the United States recognizes, we expect that this question will be largely governed by the other country's

implementing proclamation. We note, however, that under Articles 14 and 41 of the Convention, we would expect the Convention to apply only to cases that arise after the Convention enters into force between the United States and the new Convention country, not to cases already in progress.

For a full list of countries that have already ratified or acceded to the Convention, please refer to the Web site of the Hague Conference on Private International Law at <http://www.hcch.net>. From the home page, click “Welcome,” click “Conventions” from the left hand menu, click Convention No. 33 in the list provided, and then click “Status table” from the right hand menu. (The direct Web address is [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69)) If an entry into force or “EIF” date appears in connection with a country, and the United States has not objected to the accession (which would be shown by clicking on “A\*\*” in the Type column), then it is a Convention country. The Web site also lists the countries, like the United States, that have signed the treaty but for whom the treaty has not yet entered into force.

3. *Comment:* A commenter is concerned that mandatory accreditation will create a burden for agencies and persons. The commenter requests that subpart C permit voluntary accreditation. The commenter also recommends that the Department encourage agencies working in non-Convention countries to seek accreditation voluntarily.

*Response:* Consistent with the Convention, section 201 of the IAA creates a mandatory accreditation and approval system for Convention adoptions. On the other hand, the IAA does not give the Department authority to require accreditation or approval for non-Convention cases. Thus no changes are warranted in light of these comments.

#### *Section 96.13—Circumstances in Which Accreditation, Approval, or Supervision Is Not Required*

1. *Comment:* Several commenters believe that an exempted provider should be a social work professional or organization that is performing a home study but is not currently providing any other adoption service. They believe this would allow the exempt organization to become a supervised provider later, once a client selects a placing agency that will require post-placement services from the home study provider.

*Response:* The Department has changed the definition of exempted

provider, as noted in the response to comment 9 on § 96.2. The changes to the definition are meant to clarify that the event that triggers the accreditation/approval requirement is the provision of an adoption service other than a home study or child background study. Until an agency or person begins to provide such a non-exempt adoption service in addition to a home study report (or child background study), it is not required to be accredited or approved. (Note that the Department has modified the language of § 96.13(a) to remove a repetitive restatement of the definition of exempted provider found in § 96.2; this modification does not change the fact that a home study preparer or child background study preparer who is not currently and has not previously provided any other adoption service in the case is exempt from accreditation/approval.) If the exempted adoption service provider is simultaneously or subsequently asked to perform an additional adoption service in the case, however, the adoption service provider at that time would be required to become accredited, approved, or supervised before providing the additional adoption service in the United States. The examples numbered 3, 5, and 6 in § 96.15 illustrate the circumstances in which a home study provider is exempt and circumstances in which the provider would need to become accredited or approved or supervised. Example 4 in § 96.15 illustrates circumstances in which a child background study provider would be exempt.

2. *Comment:* One commenter suggests that exempted providers should be allowed to provide both home study services and post-placement services, because no agency can easily survive performing only home studies. Another commenter believes it is impractical to exempt only home study services and not post-placement services.

*Response:* The IAA specifically includes post-placement monitoring as an adoption service that requires an agency or person to be accredited, temporarily accredited, approved, or supervised.

Like post-adoption services and child welfare services, post-placement services other than post-placement monitoring are not adoption services, as discussed in the response to comment 4 on § 96.2. The change to the definition of exempted provider should clarify that providers of home studies and/or child background studies in the United States who have not performed any other adoption service in connection with a case are exempted providers until they provide a subsequent adoption service,

such as post-placement monitoring. Thus a provider may offer any combination of "exempt services" (child background studies and home studies), child welfare services (such as post-adoption services), and other non-adoption services (such as legal services) in a case without being required to be accredited, temporarily accredited, approved, or supervised. This is further discussed in the response to comment 6, below, explaining changes to § 96.13(b) and (c). Please also see example 8 in § 96.15, regarding post-placement monitoring, for a concrete illustration.

3. *Comment:* Several commenters recommend that the home study or child background study prepared by an exempted provider be submitted to an accredited agency or temporarily accredited agency for review and re-approval. The commenters assert that clarifying that the report will be re-approved instead of approved denotes that the study was approved first by the home study agency as required by State and Federal regulations, and then was submitted to the accredited or temporarily accredited agency for re-approval.

*Response:* The Department is not making this change because we believe the rule, as written, addresses the commenter's concern. The requirement in § 96.13(a) of these regulations that a study prepared by an exempted provider must be "approved" refers to the new approval requirement mandated by section 201(b)(1) of the IAA. In order to get this section 201(b)(1) approval by an accredited agency or temporarily accredited agency, § 96.47(c) requires a determination that the home study was performed in accordance with 8 CFR 204.3(e) and applicable State law. Therefore, under these regulations, home studies must comply with any applicable State approval requirements, 8 CFR 204.3(e), and the IAA requirement that the home study be approved by an accredited or temporarily accredited agency.

4. *Comment:* Several commenters believe that the regulations should not exempt home study or child background study providers from the accreditation/approval process. One commenter requests that, at a minimum, home study and child background study providers be supervised providers. Some commenters support the exemption of home study and child background study providers from accreditation/approval.

*Response:* Section 201(b)(1) of the IAA clearly exempts the providers of home studies and child background

studies in the United States from accreditation/approval requirements if such providers are not providing any other adoption service in the case.

There are other protections covering the completion of home studies and child background studies by exempted providers. The preparer of the home study or child background study must comply with other applicable Federal and State laws and regulations concerning the preparation of a home study or child background study. As an added measure of guidance and protection, the reports must be approved by an accredited agency or temporarily accredited agency who, under § 96.47(c), must determine that such laws have been complied with, and that all information required by these regulations has been included. These protections will help to ensure that the home studies and child background studies prepared by exempted providers comply with Convention requirements, the IAA, and these regulations.

5. *Comment:* A commenter asks whether U.S. social workers licensed in the United States who live abroad and perform home studies and post-adoption services for Americans overseas need to be accredited or approved. If we understand the comment correctly, such U.S. social workers often assist individual U.S. clients and U.S. child-placing agencies, but the laws of the country in which they are living may preclude their working as an employee of a U.S. agency. Thus, such a social worker cannot be an employee of an accredited agency or approved person under these regulations.

*Response:* A U.S. licensed social worker living abroad and providing post-adoption services and home studies will have to comply with the laws of the country of residence, which may preclude the social worker from being employed directly by an agency or person accredited or approved under these regulations. Such a social worker will not have to be independently accredited or approved under these regulations. In some circumstances, however, an accredited agency or approved person in the United States will be held responsible under these regulations for treating an independent overseas U.S. licensed social worker as a supervised provider, for example, if the social worker is asked to assist an accredited agency or approved person by performing home studies in cases involving immigration to the United States or by performing post-placement monitoring. If the independent overseas social worker is providing a home study



in an outgoing case, an accredited agency or approved person would also be able to use a home study prepared by the social worker if it verified the study pursuant to § 96.46(c).

6. *Comment:* A commenter recommends requiring that agencies or persons be accredited or approved if performing a home study/child background study and providing a child welfare service.

*Response:* The proposed rule caused some confusion as to the circumstances in which accreditation, temporary accreditation, supervision, or approval will be required. Confusion is difficult to avoid, in part, because section 201 of the IAA both includes home studies and child background studies in the definition of adoption services covered by the accreditation/approval/supervision requirement and provides that preparing these studies is a service exempt from accreditation/approval/supervision in certain circumstances.

The Department is changing § 96.13(b) to state the rule more clearly. As modified, § 96.13(b) states that, if an agency or person provides both a child welfare service and any of the adoption services listed in § 96.2 in the United States in a Convention case, it must be accredited, temporarily accredited, approved or supervised unless the only adoption service provided is preparation of a home study and/or a child background study. Thus, if the agency or person is an exempted provider and provides a child welfare service, the agency or person is still an exempted provider. It will remain exempted from accreditation/approval even if, in addition to providing child welfare services it also provides a home study, child background study, or both.

Otherwise the home study and child welfare services exemptions, explicitly required by the IAA, would have little force. On the other hand, if an agency or person provides an adoption service in the United States in addition to the child background study or home study, then that agency or person must be accredited, temporarily accredited, approved or supervised. For further clarification, the Department has added at § 96.15 examples illustrating circumstances when providers must be accredited, temporarily accredited, approved, or supervised, and examples of when they are exempt. Examples 2 and 5 of § 96.15 specifically address the child welfare services exemption.

To be consistent with § 96.13(b), the Department has also modified § 96.13(c) so that, if an agency or person provides both legal services and any adoption service defined in § 96.2 in the United States in a Convention adoption case, it

must be accredited, temporarily accredited, approved or supervised unless the only adoption service provided is preparation of a home study and/or a child background study.

7. *Comment:* A commenter is concerned that facilitators, permitted to operate under some States' laws and not others, will be exempt from becoming accredited or approved. The commenter believes that this will provide unlicensed facilitators an unfair advantage by permitting them to provide services without adhering to State or Federal licensing laws.

*Response:* Any agency or person that provides one of the adoption services defined in § 96.2 in the United States must be accredited, temporarily accredited, approved, supervised, or an exempted provider under these regulations, regardless of whether or not the agency or person must be licensed or otherwise authorized in the State in which they operate. Furthermore, providers must still comply with any other applicable State and Federal laws.

8. *Comment:* A commenter is concerned that the regulations do not protect parents who try to adopt independently, without the aid of an agency or person. The commenter believes that such parents may be particularly susceptible to questionable adoption practices. Also, one commenter thinks that parents adopting independently should not be exempt from the regulations. Other commenters suggest that adoptive parents should not have to comply with the Convention, the IAA or other applicable laws when acting on their own behalf.

*Response:* Because section 201(b)(4) of the IAA explicitly exempts prospective adoptive parent(s) who are acting on their own behalf from any accreditation/approval requirements, § 96.13(d) is retained in the final rule. Notwithstanding this exemption, prospective adoptive parent(s) acting independently must comply with the Convention, other applicable provisions of the IAA, and other applicable laws. Moreover, as provided in § 96.13(d), parent(s) may act on their own behalf only if such action is allowed under applicable State law and the law of the concerned Convention country.

9. *Comment:* A commenter requests that the regulations emphasize that "post-adoption services," including reminding the prospective adoptive parent(s) of their need to file post-adoption reports with the country of origin, are not "adoption services."

*Response:* The commenter is correct that post-adoption services—those services provided after a child's adoption—are not adoption services

under the IAA. The preparation of post-adoption reports and efforts to encourage parents to file these reports are post-adoption services. Agencies or persons that solely perform such types of post-adoption services do not need to be accredited, temporarily accredited, approved, or supervised. The Department does not consider any change to the regulation to be necessary in response to this comment.

10. *Comment:* One commenter notes that several foreign governments require adoptive parent(s) to use an agency or person for post-adoption reporting. The commenter states that many agencies and persons currently take advantage of this requirement by overcharging adoptive parent(s) for these services. The commenter requests that the Department attempt to regulate this behavior.

*Response:* The preparation and filing of post-adoption reports are post-adoption services. The IAA does not cover such services, or provide a basis to regulate the fees charged for them. Nevertheless, § 96.40(b)(7) requires an accredited agency, temporarily accredited agency, or approved person to disclose in writing its expected fees and estimated expenses for any post-placement or post-adoption reports that the agency or person or parent(s) must prepare in light of any requirements of a child's expected country of origin. The Department believes that this requirement will help prospective adoptive parent(s) to make informed choices when choosing an agency or person and will promote fair and ethical fee arrangements.

11. *Comment:* One commenter requests that the Department draft a "non-interference" regulation that prohibits agencies and persons from interfering in an adoption when prospective adoptive parent(s) act on their own behalf.

*Response:* The Department does not believe that it is necessary at this time to include a non-interference provision, assuming that one germane to accreditation/approval could be crafted. If a prospective adoptive parent believes that an accredited agency or approved person is acting incompatibly with the IAA's exemption of prospective adoptive parent(s) acting on their own behalf from the accreditation/approval requirements, the complaint procedures of this rule will apply.

#### *Section 96.14—Providing Adoption Services Using Other Providers*

1. *Comment:* Several commenters are concerned about the relationship between a primary provider and entities accredited by Convention countries

(foreign accredited providers). Many want the regulations to reach as many types of providers who operate overseas as possible, while others stress that U.S. agencies and persons are not able to control or oversee the conduct of foreign providers. Some commenters want primary providers to be responsible for supervising the actions of every agency or person they use overseas, but others support the proposed rule, under which primary providers were not responsible for supervising foreign accredited providers.

*Response:* The issue of who a primary provider must treat as under its supervision and responsibility is clearly one on which reasonable people differ.

As explained at section III, subsection A of the preamble, above, the Department has modified §§ 96.14(c) and (d) to require that providers accredited by the Convention country, in addition to providers that are unregulated by the Convention country, be treated as foreign supervised providers, unless they are performing a service qualifying for verification under § 96.46(c). A primary provider will therefore need to exercise care in selecting foreign supervised providers, and will need to oversee their work; it may lose its status as an accredited agency or approved person if it fails to ensure that its use of foreign supervised providers meets the relevant standards in § 96.46.

This change in the regulations is consistent with the Department's view—made express in new § 96.12(c)—that accreditation is not a guarantee of good behavior. It also underscores the importance of U.S. agencies or persons working with ethical providers in other countries in order to ensure that all Convention adoptions comply with Convention standards. The final rule means that primary providers cannot ignore questionable practices simply because they are committed by a foreign provider that has been accredited. While the exception for services qualifying for verification acknowledges that U.S. agencies and persons may not be well positioned to supervise the providers of such services, the after-the-fact verification requirement will require the U.S. agency or person acting as the primary provider to take appropriate steps to ensure that the requirements of the Convention and local law have been met.

2. *Comment:* Some commenters state that primary providers should be fully responsible for all “agents” and individuals that assist them in the country of origin.

*Response:* Under the IAA and this rule, whether a primary provider must

supervise an “agent” or other individual in a Convention country does not turn on what the provider is called. Section 96.14 requires that a primary provider adhere to the standards of § 96.46 when using any foreign non-governmental provider, and § 96.2 now makes clear that “agents” and other foreign entities are included in the definition of supervised provider. These modifications to the regulations are sufficient to address this comment.

3. *Comment:* One commenter notes a Connecticut case in which the court refused to award a State subsidy to an adoptive parent—presumably located in Connecticut—because the entity that “placed” the child was not licensed in Connecticut, and suggests that the Department address the interpretation of State statutes regarding the award of post-adoption subsidies through these regulations.

*Response:* The Department infers that the commenter believes that the Department could affect when State subsidies are available by including in the regulation a provision regarding, for example, whether a primary provider or a supervised provider will be considered to have “placed” a child for adoption, or where an adoption service provider will be deemed to be located, if multiple providers are involved in a Convention adoption. The Department does not agree that this issue can or should be addressed in these regulations.

4. *Comment:* A commenter requests that the Department change § 96.14(b)(2) because, as written, it appears that home studies performed by an exempted provider must be approved by any accredited agency, but not specifically by the primary provider. Other commenters suggest primary providers could be reluctant to accept home studies from exempted providers that they themselves did not approve.

*Response:* The Department is not making the change suggested because the Department believes that the regulation, as written, is consistent with the IAA, section 201(b)(1), which requires only that a home study prepared by an exempted provider be reviewed and approved by an accredited agency. We do not believe it is necessary to require further that the accredited or temporarily accredited agency approving the home study be the primary provider in the Convention case, and do not believe that this provision will deter primary providers from accepting home studies from exempted providers. While the primary provider must supervise and be responsible for the supervised providers with which it works, primary providers

may need the flexibility to accept home studies prepared by exempted providers that have been approved by other accredited or temporarily accredited agencies (for example those located in other States) to complete Convention adoptions. Otherwise, primary providers could find it difficult to work with out-of-State prospective adoptive parent(s).

5. *Comment:* A commenter is concerned that small agencies will have trouble finding work as supervised providers because large accredited agencies will attempt to curb competition by performing all services in a case on their own, and recommends that, in lieu of having primary providers supervise other agencies, the Department step into the role of supervisor of the provision of adoption services by smaller agencies.

*Response:* It would be incompatible with the IAA's scheme for Convention implementation for the Department to take on a direct role in supervising the provision of adoption services, and we therefore decline to make any change in response to this comment. As well, we note that temporary accreditation, under section 203(c) of the IAA, is meant to address this commenter's concerns, by providing a mechanism to allow small agencies to continue to operate independently of larger agencies, while giving the small agencies a longer period of time to gather the information and resources necessary to achieve full accreditation. Moreover, while we cannot fully predict at this time the public demand for provision of adoption services in Convention cases, we believe that it is unlikely that accredited agencies or approved persons will have the resources to take over providing all of the adoption services that are currently handled by small agencies or persons. Also, when working with out-of-state clients, accredited agencies and approved persons will likely need supervised providers to provide adoption services in States where they are not licensed. Thus, the Department anticipates that small agencies and persons will continue to be able to provide services in Convention adoptions.

6. *Comment:* One commenter requests that the Department specifically outline what services require an agency or person to be accredited or approved.

*Response:* Only an agency or person providing adoption services, as defined in the IAA and in § 96.2, in a Convention adoption in the United States is required to be accredited or approved. An agency or person may avoid accreditation or approval if it provides Convention adoption services

solely as a supervised provider or exempted provider. Section 96.15 provides examples of circumstances in which an adoption service provider will be required to be accredited, temporarily accredited, or approved or to operate as a supervised provider or exempted provider.

*Section 96.16—Public Domestic Authorities*

*Comment:* The Department received a comment stating that it should require public domestic authorities providing adoption services to become accredited just like private entities, because it is “hypocritical” for the U.S. Government to have one set of rules for private agencies and a different set for public domestic authorities.

*Response:* While initial draft versions of the IAA did not exclude government agencies from the category of persons to be accredited or approved, (S. 682, 106th Cong. 1st Sess. (1999) and H.R. 2342, 106th Cong. 1st Sess. (1999)), sections 3(14) and 201(a) of the IAA as enacted, taken together, provide that persons to be accredited/approved shall not include an agency of government or tribal government entity, thereby excluding public domestic authorities from the accreditation and approval requirement. The Department understands this to exclude all State, local and tribal government entities—an approach that is consistent with the concerns of the Convention’s drafters about abuses by private entities and that avoids placing the Federal government in the role of regulating State and local governments unnecessarily. (See the Notice of Proposed Rulemaking at 68 FR 54079 for further discussion of this issue.)

*Section 96.17—Effective Date of Accreditation and Approval Requirements*

*Comment:* A commenter asks what will happen to an agency that has not completed the accreditation process when the Convention enters into force.

*Response:* Once the Convention enters into force for the United States, any agency or person providing adoption services in connection with a Convention adoption in the United States will need to be accredited, temporarily accredited, approved, supervised, or be an exempted provider. The rule has a special timetable for the initial round of accreditation/approvals, which is discussed in the section-by-section responses for subpart D.

**Subpart D—Application Procedures for Accreditation and Approval**

Subpart D is organized in the same way as in the proposed rule, and includes § 96.18 (Scope); § 96.19 (Special provision for agencies and persons seeking to be accredited or approved as of the time the Convention enters into force for the United States); § 96.20 (First-time application procedures for accreditation and approval); § 96.21 (Choosing an accrediting entity); and § 96.22 (Reserved).

As discussed below, the Department has made no changes to this subpart in response to public comment. It has made minor technical and conforming changes, however.

*Section 96.19—Special Provision for Agencies and Persons Seeking To Be Accredited or Approved at the Time the Convention Enters Into Force for the United States*

*Comment:* Commenters support the transitional application deadline (TAD) and deadline for initial accreditation or approval (DIAA) process. Some request that the regulations more clearly outline the process for those who obtain accreditation after the Convention has entered into force. Another commenter suggests that any agency or person that has applied for full accreditation during the initial accreditation/approval timeframe, but that has not been processed by an accrediting entity through no fault of its own, should be granted temporary accreditation.

*Response:* We are not modifying the rule to allow temporary accreditation to be granted to an applicant for full accreditation that has not been accredited by the DIAA. The IAA specifically limits temporary accreditation to small agencies, as defined in section 203(c) of the IAA. The Department recognizes, however, that a large volume of applications may make it difficult for accrediting entities to complete accreditations and approvals in an expedited fashion. For this reason, § 96.19 establishes that a TAD will be published before the final DIAA. After the Department learns the number of agencies and persons that applied by the TAD, and has an estimate of how long it will take the accrediting entities to evaluate each applicant (including conducting necessary site visits), it will announce the DIAA. The DIAA will be the date by which an agency or person must complete the accreditation or approval process so as to be accredited or approved when the Convention enters into force for the United States. Since the DIAA will be

set after the Department and the accrediting entities have a better idea of how long it will take the accrediting entities to do their job, all agencies and persons who applied by the TAD should have a reasonable opportunity to have their applications for accreditation or approval reviewed by the DIAA. The process for applying for accreditation/approval after the Convention has entered into force is already described in § 96.20.

*Section 96.20—First-Time Application Procedures for Accreditation and Approval*

*Comment:* A commenter believes that the regulations should specify the length of time an accrediting entity has to evaluate an applicant for accreditation or approval, and suggests 90 days.

*Response:* While the Department wants to ensure that applications for accreditation and approval are reviewed as quickly as possible, it is not establishing a deadline by which accrediting entities will have to complete their work. Variables like the number of agencies and persons that will apply, and the number and capacity of the accrediting entities, require that the time frame remain flexible. In addition, § 96.24(d) authorizes accrediting entities to give agencies and persons an opportunity to cure deficiencies before denying an application for accreditation or approval. If the Department imposed a 90-day limit on completion of accreditation and approval decisions, accrediting entities could be forced to deny applications in circumstances where an agency or person had not yet cured any identified deficiencies within 90 days. We believe agencies and persons will benefit from an accreditation and approval process that retains some flexibility.

*Section 96.21—Choosing an Accrediting Entity*

*Comment:* Some commenters recommend that applicants for accreditation and approval be allowed to apply to any designated accrediting entity, regardless of geographical location. Other commenters ask that the regulations clarify the accrediting entity to which an agency or person that is licensed in more than one State should apply for accreditation or approval.

*Response:* Section 96.21(a) states that an agency or person applying for accreditation or approval may apply to any accrediting entity with jurisdiction over its application. The criteria to determine the accrediting entities’ jurisdiction will be set out in the

agreements between the Department and each accrediting entity. These agreements will be published in the **Federal Register**. The agreements between the Department and any accrediting entity that is a State licensing authority will have geographical limitations on its jurisdiction that are consistent with section 202(a)(2)(B)(ii) of the IAA, which states that public entities designated as accrediting entities will be permitted to accredit "only agencies located in the State in which the public entity is located."

#### **Subpart E—Evaluation of Applicants for Accreditation and Approval**

Subpart E is organized in the same way as in the proposed rule, and includes § 96.23 (Scope); § 96.24 (Procedures for evaluating applicants for accreditation or approval); § 96.25 (Access to information and documents requested by the accrediting entity); § 96.26 (Protection of information and documents by the accrediting agency); § 96.27 (Substantive criteria for evaluating applicants for accreditation or approval), and § 96.28 (Reserved).

The Department has made a number of changes in response to public comments, including to § 96.24, § 96.25, § 96.26, and § 96.27, which are discussed below.

#### *Section 96.24—Procedures for Evaluating Applicants for Accreditation or Approval*

1. *Comment:* Several commenters request that the Department address whether agencies that have undergone voluntary accreditation, as offered by the Council on Accreditation (COA), will have any "deemed status." Similarly, several commenters request that, if an agency or person is already voluntarily accredited, then the accrediting entity recognize automatically compliance with certain subpart F standards that they believe are duplicative of the standards under which they were voluntarily accredited. Some voluntarily accredited small agencies contend that they cannot afford a second accreditation.

*Response:* The Department will not allow agencies or persons that have undergone a voluntary accreditation process to have "deemed" Convention accreditation or approval status. The Department acknowledges that some standards of subpart F overlap with the COA voluntary accreditation standards, however, there are many standards in subpart F that do not overlap. We do not believe that COA voluntary accreditation is a substitute for ensuring that all agencies meet the specific

standards on intercountry adoption practices that are derived from the Convention and the IAA and set forth in subpart F. For example, § 96.33(b) requires an agency's or person's finances to be subject to independent audits every four years. COA standard G6.5.02 does not require any audit of an organization that annually reports revenues less than \$500,000. Similarly, § 96.34(a) prohibits an agency or person from compensating any individual providing intercountry adoption services on a contingent fee basis, and § 96.34(b) prohibits an agency or person from compensating its directors, officers, employees or supervised providers on a contingent fee basis. COA standards have no explicit prohibition against contingent fees. The regulation in § 96.35(b) also contains requirements that are not in COA standards. The COA standards are focused on overall organizational integrity and ensuring best child welfare practices. The Department's standards are instead focused on implementing specific provisions of the IAA and ensuring that agencies and persons can perform Convention tasks. Finally, considerations of equity and timeliness counsel against allowing a COA voluntary accreditation to substitute, in whole or in part, for accreditation under these regulations—equity vis-à-vis agencies and persons who have not participated in COA's voluntary program and timeliness to the extent that accreditation under these regulations will be based on information to be collected in the future and closer to time to entry into force.

2. *Comment:* Several commenters ask that agencies and persons that have a State license become automatically accredited. Other commenters seek deeming of State licensing authorities' standards.

*Response:* The IAA does not authorize the Department to substitute licensure by a State for accreditation/approval under the Federal scheme created by the IAA. The Convention and the IAA mandate many specific duties for agencies and persons, including reporting duties, which are not part of current State licensing. In addition, because licensing requirements vary between States, allowing "deeming" would be at odds with the IAA's goal of uniform interpretation and implementation of the Convention, IAA section 2(a)(2), and might lead to disparities between agencies and persons, depending on their location. Thus, the fact that an agency or person is licensed or authorized by State licensing authorities is only one factor

to consider in determining whether it can be accredited or approved.

3. *Comment:* A commenter notes that the nonprofit charitable organization she works with cannot place children with adoptive parents because it has just received State licensure as a child-placing agency, and the authorities in the foreign country in which it works require a child-placing agency to have been licensed at least four years before it is allowed to place children. The commenter expresses hope that the Department will be able to resolve the issue of differing standards in different countries in this rule, and welcome new agencies into the Convention system.

*Response:* The Department welcomes all agencies and persons, both new and old, to apply for accreditation or approval. The Department hopes that birth parents and prospective adoptive parent(s) will be able to select a provider from a broad and geographically diverse pool of accredited agencies and approved persons to help them with Convention adoptions. Article 12 of the Convention, however, states that an agency that is accredited in one Convention country may provide services in another Convention country only if it has been authorized to do so by the authorities of both countries. Thus, the United States cannot, in this rule, ensure that U.S. accredited agencies and approved persons will be entitled to work in all Convention countries. The Department expects, however, that because the standards for U.S. accreditation and approval will be stringent and comprehensive, Convention countries may be willing to accept U.S. accreditation or approval, without requiring further accreditation or approval.

4. *Comment:* One commenter notes that the proposed regulation would require evaluators to have experience in intercountry adoption or the evaluation of compliance with standards. While the commenter believes it would be preferable to require experience with both, because it expects that any entity designated as an accrediting entity would receive an initial flood of accreditation/approval applications, it requests that § 96.24(a) be revised to allow the use of a wider pool of evaluators who do not have intercountry adoption experience in order to complete accreditation/approval on a timely basis. Another commenter would like the regulation to specify that at least one evaluator participating in site visits must have experience with intercountry adoption.

*Response:* The Department has expanded the qualifications for

evaluators in § 96.24(a). Those qualifications now include: (1) Expertise in intercountry adoption; (2) expertise in standards evaluation; or (3) experience with the management or oversight of a child welfare organization. The Department believes that permitting evaluators to meet any of these three qualifications will ensure that accrediting entities perform high-quality evaluations of agencies and persons, while leaving them flexibility to find enough qualified site evaluators. To preserve flexibility, we are not mandating that the visiting site evaluator be the one with the intercountry adoption experience.

5. *Comment:* Some commenters are concerned that the accrediting entities will not consider complaints when evaluating agencies and persons.

*Response:* We have added a provision to § 96.24(b) to require that accrediting entities consider complaints referred to them under subpart J of this rule when reviewing an agency's or person's accreditation or approval status.

6. *Comment:* A commenter asks whether an agency seeking accreditation must cover the cost of any off-site interviews with individuals (e.g., clients who have moved to a different city from the agency).

*Response:* Pursuant to § 96.8(b)(2), agencies and persons will pay a nonrefundable fee for full accreditation or approval that is set to include "the costs of all activities associated with the accreditation or approval cycle, including but not limited to, costs for completing the accreditation or approval process \* \* \* except that separate fees based on actual costs incurred may be charged for the travel and maintenance of evaluators." Thus, an agency or person can be expected to cover the cost of doing any off-site interviews, whether the cost is incorporated fully into the accreditation or approval fee or recovered in part through fees for travel costs incurred by evaluators to do off-site interviews.

The fee arrangement is different for those agencies seeking temporary accreditation, but the net result is the same with respect to off-site interviews. The accrediting entity will charge a non-refundable fee for temporary accreditation that will not include the costs of site visits, whether on- or off-site, because a site visit is not mandatory to receive temporary accreditation. If the accrediting entity decides a site visit is necessary to determine whether to approve an application for temporary accreditation, the accrediting entity will assess additional fees to the agency for the

costs of a site visit, including any costs for off-site interviews.

7. *Comment:* A commenter requests the following revision to § 96.24(d) to make notice of deficiencies to a candidate for accreditation or approval mandatory: "Before deciding whether to accredit an agency or approve a person, the accrediting entity shall advise the agency or person of any deficiencies that may hinder or prevent its accreditation or approval and defer a decision to allow the agency or person to correct the deficiencies."

*Response:* The Department has not changed the language of the proposed rule. Section 96.24(d) already permits an accrediting entity discretion to give an agency or person advance notice of and an opportunity to cure any deficiencies that may hinder or prevent its accreditation or approval. The accrediting entities are being chosen based on their expertise and experience with accreditation and/or licensing of adoption service providers, and the rule defers to that expertise by giving them discretion to judge whether it would be constructive to give notice and an opportunity to cure deficiencies before any specific denial.

8. *Comment:* One commenter notes that § 96.24(c) provides for persons with knowledge of an agency's or person's work to comment on an application for accreditation or approval, but that the Department has not provided a mechanism for making such comments. The commenter states that knowledgeable individuals have no way of knowing whether an agency or person has filed for accreditation or approval.

*Response:* This issue is not addressed fully in the regulation, but will be further addressed in the agreements with the accrediting entities. Pursuant to § 96.91(b)(1), once the Convention has entered into force, individuals who wish to comment on an agency's or person's application for accreditation or approval may ask an accrediting entity to confirm whether that agency or person has a pending application for accreditation or approval. The Department intends, in its agreements with the accrediting entities, to require that the accrediting entities also make available to the public information related to agencies and persons that apply to be accredited or approved by the date of entry into force. We also intend to address in the agreements with the accrediting entities the mechanism by which the public can communicate to the accrediting entity comments on initial applications for accreditation or approval. The agreements will be published in the **Federal Register**.

#### *Section 96.25—Access to Information and Documents Requested by the Accrediting Entity*

1. *Comment:* Several commenters ask the Department to clarify whether accrediting entities are allowed access to information and documents belonging to an agency or person regarding non-Convention cases. These commenters request that the Department specifically limit the accrediting entity's access to information and documents to Convention adoption cases only.

*Response:* The Department has modified this section to clarify that, with the exception of first-time applicants for accreditation or approval, agencies and persons are only required to give accrediting entities access to adoption case files related to Convention adoptions. Thus, if an agency seeking renewal of accreditation provides adoption services relating to both children from a Convention country and children from a non-Convention country, the agency or person would have to give the accrediting entity access to any adoption case files relating to intercountry adoptions with the Convention country, but not to the files relating solely to its intercountry adoptions from the non-Convention country. The exception to this rule, which now appears at § 96.25(b), is that the accrediting entity may review case files of non-Convention adoption cases for the purpose of assessing a first-time applicant's capacity to comply with the record-keeping and data-management standards in subpart F. We make this exception so that accrediting entities have the option of reviewing adoption case files of a first-time applicant if they are concerned about the applicant's record-keeping capabilities, since the applicant will not have any Convention case files to be reviewed. Section 96.25(b) makes it clear that, if such review is requested by an accrediting entity, the agency or person may withhold names and other information that identifies birth parent(s), prospective adoptive parent(s), and adoptee(s) from such non-Convention adoption case files to protect the privacy of those individuals.

The general rule prohibiting review of non-Convention adoption case files does not apply with respect to documents and information, such as policy guidelines, that relate to both Convention and non-Convention adoptions. The accrediting entity must be given access to such documents and information. For example, accrediting entities will be allowed to look at documents relating to an agency's or

person's finances and corporate governance, which relate to both Convention and non-Convention adoption activities.

2. *Comment:* A commenter suggests that the Department amend § 96.25(a) so that it reads: "The agency or person must give the accrediting entity access to all information and documents \* \* \* that it requests [instead of "requires"] to evaluate an agency or person," in order to remove any argument that the accrediting entity would be required to justify why access to certain documents or information was necessary to the accreditation process.

*Response:* The Department has modified § 96.25(a) so that it states that an agency or person must give the accrediting entity access to information and documents "that it requires or requests" to evaluate an agency or person for accreditation or approval. This should make it clear (subject to the general rule prohibiting review of non-Convention adoption case files) both that the agency or person must give the accrediting entity the information and documents it needs, even if not requested by the accrediting entity, and that the agency or person must give the accrediting entity what the accrediting entity requests, without challenging whether the accrediting entity needs the information and documents.

#### *Section 96.26—Protection of Information and Documents by the Accrediting Entity*

1. *Comment:* Several commenters request that all documents used by an accrediting entity in the accreditation process be made available to the public, subject only to existing Federal, State, and local laws. They suggest that the documents could help prospective adoptive families choose which agency or person to use for adoption services. Commenters also request that an agency's or person's list of supervised providers (particularly foreign supervised providers) be public information. These commenters want § 96.26(a), which sets limits on disclosure of information procured by the accrediting entity, to be deleted. Other commenters recommend that the Department maintain § 96.26(a) as it is written. They believe that confidentiality is essential to facilitating an open relationship between accrediting entities and agencies and persons seeking accreditation/approval. Some commenters think subpart M appropriately specifies the types of information that should be provided to the public. One State licensing authority requests that the Department elaborate on the interplay between the Freedom of

Information Act (FOIA), 5 U.S.C. 552 and § 96.26, because it believes § 96.26 conflicts with the FOIA.

*Response:* We have made a few changes to § 96.26(a). Section 96.26(a) continues to require accrediting entities to protect from unauthorized use and disclosure all documents and information the accrediting entity may collect while doing its job of evaluating an agency or person, such as self studies, internal policies, corporate financial data, and background information on individual employees. We are not deleting the basic rule of confidentiality, because we believe it is appropriate when agencies and persons are being asked to disclose internal business information.

In order to clarify in what circumstances information may be disclosed, and to reinforce that the confidentiality rule does not prohibit disclosures otherwise required under State or Federal law, we have moved and revised language from § 96.26(a) to a new § 96.26(b). Section § 96.26(b) now contains the general prohibition on disclosure of such documents and information to the public, and sets out the circumstances in which it is appropriate to release information. In particular, § 96.26(b)(2) now includes new language making it clear that the accrediting entity may not withhold information, including an agency's or person's internal documents, if otherwise required to release it under State or Federal law. We note that § 96.26 of the final rule cannot conflict with the FOIA or similar State laws because the prohibitions against disclosure in § 96.26(b)(2) do not apply if disclosure is otherwise required under Federal or State laws. Thus, if the FOIA or other information disclosure laws apply, accrediting entities must comply with those laws.

2. *Comment:* A commenter requests that the Department delete the first sentence of § 96.26(b) (now § 96.26(c)), which allows agencies and persons to provide documents in which individually assigned codes have been substituted for personal identifying information, because it believes monitoring the actual practices of an agency or person requires a comprehensive list identifying all clients, including prospective adoptive parent(s) and birth parent(s), and because it believes the provision is unnecessary because the remainder of the provision already imposes a duty of confidentiality on the accrediting entity.

*Response:* The Department has to balance the need of accrediting entities to obtain information on the practices of accredited agencies and approved

persons against the need to protect the privacy of individual participants in the adoption process. The Department believes that this provision, now § 96.26(c), strikes the right balance between these competing interests by giving accrediting entities the authority to request information that identifies birth parents, prospective adoptive parent(s), and adoptees if they have an articulated need for that information, but not requiring the automatic disclosure of all such information, and thus it has made no changes in response to this comment.

#### *Section 96.27—Substantive Criteria for Evaluating Applicants for Accreditation or Approval*

1. *Comment:* Several commenters suggest that using a point system for evaluating compliance with standards will be too subjective. Many also believe that a substantial compliance system is too vaguely defined in the regulations. Some request that the regulations specify how different standards will be weighted. Other commenters commend the Department for allowing accrediting entities to develop a substantial compliance system and express support for the rule as written. Some commenters request that the Department submit any substantial compliance procedures to notice and comment rulemaking. Other commenters recommend that any system prevent an agency or person from achieving accreditation or approval if it does not meet all minimum requirements in section 203(b)(1)(A)–(F) of the IAA.

*Response:* The Department did not think it was advisable to include a methodology for measuring substantial compliance in the rule, and continues to be of that view. The accrediting entities, who will be using the methodology and who will have more experience than the Department in administering standards, should take the lead in preparing the procedures for measuring substantial compliance.

We have, however, revised § 96.27(d) to clarify that the Department will retain oversight over the development and use of substantial compliance procedures by the accrediting entity, ensuring that each accrediting entity only uses a method approved by the Department, and that each method is substantially the same as all other approved methods. In accordance with the rule, once an accrediting entity is selected, the entity must develop a method of evaluating compliance. Each such method will include: an assigned value for each standard or element of a standard; a method of rating compliance with each standard; and a method of evaluating an

agency's or person's overall compliance with all of the applicable standards. The Department must then approve each accrediting entity's method for ascertaining substantial compliance, ensuring that the value assigned to each standard reflects the Convention and the IAA and is consistent with the value assigned to the standard by other accrediting entities. The weighting of particular standards will be based on the priorities set in the Convention and the IAA (including the core standards in IAA section 203(b)(1)(A)-(F)).

The Department does not agree that substantial compliance procedures, when developed, must or should be subject to Administrative Procedure Act rulemaking procedures. The final rule, like the proposed rule, instead requires that accrediting entities advise applicants of the value assigned to the standards or elements of the standards at the time they provide applicants with the application materials. This notice and the Department's oversight of the development of the procedures for measuring substantial compliance will ensure that agencies and persons are informed about the procedures before seeking accreditation or approval, and that the procedures reflect the objectives of the Convention and the IAA.

2. *Comment:* Several commenters do not agree with the use of a substantial compliance system. They request that the regulations require complete compliance with all the standards of subpart F. Many other commenters express their support for a substantial compliance model. Some are concerned that the accrediting entities will require compliance with standards not contained in subpart F.

*Response:* There has been considerable disagreement in the adoption community about which of the standards in subpart F—if any—should be made absolute. The preamble to the proposed rule discussed this issue extensively. (See 68 FR 54080). The IAA plainly contemplates a substantial compliance standard, however, as section 204(b)(1) of the IAA requires the Department to suspend or cancel the accreditation or approval of an agency or person who is “substantially out of compliance with applicable requirements,” if the accrediting entity has not taken appropriate enforcement action. In addition, the standards in Part F address a wide range of ethical and social work and adoption issues and reflect practices that inherently are evolving. One-time failures to comply with a particular standard, though unfortunate, should not necessarily lead to the imposition of severe types of adverse action such as cancellation of

accreditation or approval. The Department considers it essential to give sufficient discretion to accrediting entities, which will be selected based on their expertise, to decide when noncompliance warrants adverse action, and which kind of adverse action to take.

The Department recognizes that adherence to certain individual standards is critical to protecting children and families and comporting with the requirements of the Convention and the IAA. Therefore, as noted in the response to comment 1 for this section, the accrediting entity is required to develop and use a method for measuring substantial compliance which includes assigning values and weighting each individual standard, or element of a standard, reflecting the relative importance of each standard to compliance with the Convention and IAA. The accrediting entity may not use standards other than those contained in this rule.

3. *Comment:* Several commenters believe that the accreditation process described in § 96.27 focuses too heavily on document review. They would like the regulations to emphasize analysis of an agency's or person's past performance, including successful adoptions, disruptions and dissolutions, complaints, and pending or resolved lawsuits, as the primary criteria for accreditation. Some commenters suggest that the primary basis of evaluation for accreditation should be interviews of clients chosen on a random basis, as well as interviews with former employees, agents, and consultants. One commenter suggests that a provider should be required to waive any confidentiality requirements contained in settlements of lawsuits. Some commenters would like agencies to give accrediting entities a list of all their clients and former clients to aid in the evaluation.

*Response:* We believe the overall process outlined in the rule for evaluating agencies and persons and determining substantial compliance is consistent with the IAA's accreditation model. It is worth noting that accrediting entities will not initially be able to monitor actual performance of agencies in completing Convention adoptions because the Convention will not enter into force for the United States until after some agencies and persons have been accredited and approved. Therefore, during the initial accreditation process a certain amount of document review is necessary to measure an agency's or person's capacity to meet the standards once the Convention is in force. The rule takes

this into account in § 96.27(b). The rule also requires, however, in § 96.24(b) that accrediting entities conduct site visits for each agency or person seeking accreditation or approval. As provided in § 96.24(c), these site visits may include “interviews with birth parents, adoptive parent(s), prospective adoptive parent(s), and adult adoptee(s) served by the agency or person, and interviews with other individuals knowledgeable about the agency's or person's provision of adoption services.” Thus, we do not agree that the evaluation process focuses too much on document review.

In addition, § 96.24(b) has been revised to require consideration of complaints received under subpart J; § 96.27(b) requires that past performance generally be considered in determining if an agency or person may retain or renew its accreditation or approval to complete Convention adoptions; and other standards in subpart F, in particular § 96.35, require the disclosure to the accrediting entity of much of the information these commenters wish to have the accrediting entity consider. Please see the discussion of comments on § 96.35's disclosure provisions, including disclosures related to lawsuits, complaints, and disciplinary proceedings for further explanation.

4. *Comment:* A State licensing authority commends the Department for explaining, in § 96.27(g), that the accreditation standards under these regulations do not eliminate the need for an agency or person to comply fully with the laws of the State in which it operates. The commenter suggests two modifications to enhance a close working relationship between accrediting entities and State licensing authorities that are not accrediting entities. First, it recommends that the Department require the accrediting entities to consult with State licensing authorities to verify that applicants for accreditation or renewal of accreditation are in compliance with State licensing requirements. Secondly, it recommends that the Department specifically allow accrediting entities and State licensing authorities to share information with each other pursuant to the access to information provisions of § 96.26.

*Response:* The Department encourages open communication between accrediting entities and State licensing authorities and has revised the language of § 96.26(b) to clarify that sharing information with an appropriate public domestic authority, such as a State licensing authority, is authorized.

### Subpart F—Standards for Convention Accreditation and Approval

Subpart F is organized in the same way as in the proposed rule with informal “divisions” after the first section, § 96.29 (Scope). The Licensing and Corporate Governance division includes § 96.30 (State licensing); § 96.31 (Corporate structure); and § 96.32 (Internal structure and oversight). The Financial and Risk Management division includes § 96.33 (Budget, audit, insurance, and risk assessment requirements) and § 96.34 (Compensation). The Ethical Practices and Responsibilities division includes § 96.35 (Suitability of agencies and persons to provide adoption services consistent with the Convention) and § 96.36 (Prohibition on child buying). The Professional Qualifications and Training for Employees division includes § 96.37 (Education and experience requirements for social service personnel) and § 96.38 (Training requirements for social service personnel). The Information Disclosure, Fee Practices and Quality Control Policies and Practices division includes § 96.39 (Information disclosure and quality control practices) and § 96.40 (Fee policies and procedures). The division on Responding to Complaints and Records and Reports Management includes § 96.41 (Procedures for responding to complaints and improving service delivery); § 96.42 (Retention, preservation and disclosure of adoption records); and § 96.43 (Case tracking, data management, and reporting). The Service Planning and Delivery division includes § 96.44 (Acting as a primary provider); § 96.45 (Using supervised providers in the United States); and § 96.46 (Using providers in Convention countries). The division on Standards for Cases in Which a Child Is Immigrating to the United States (Incoming Cases) includes § 96.47 (Preparation of home studies in incoming cases); § 96.48 (Preparation and training of prospective adoptive parent(s) in incoming cases); § 96.49 (Provision of medical and social information in incoming cases); § 96.50 (Placement and post-placement monitoring until final adoption in incoming cases); § 96.51 (Post-adoption services in incoming cases); and § 96.52 (Performance of Hague Convention communication and coordination functions in incoming cases). The division on Standards for Cases in Which a Child Is Emigrating From the United States (Outgoing Cases) includes § 96.53 (Background studies on the child and consents in outgoing cases); § 96.54 (Placement standards in

outgoing cases); § 96.55 (Performance of Hague Convention communication and coordination functions in outgoing cases); and § 96.56 (Reserved).

The Department has made a number of changes to subpart F in response to public comments. In particular, as discussed at section III, subsection B of the preamble, revisions have been made to § 96.33’s insurance standard, to § 96.37 on social service personnel education and experience, to § 96.39’s provision on waivers of liability, and to the provisions relating to primary provider responsibility for supervised providers in the United States and for foreign providers in Convention countries §§ 96.45–46. Comments on these provisions, and changes to a number of others, such as §§ 96.32, 96.34, 96.35, 96.38–44, and 96.47–54, are discussed below. We also changed the sections on preparation of home studies in incoming cases (§ 96.47) and child background studies in outgoing cases (§ 96.53) to clarify that, under the IAA, a supervised provider may prepare a home study or child background study.

### Licensing and Corporate Governance

#### Section 96.30—State Licensing

1. *Comment:* Several commenters recommend revising § 96.30(c) to state that agencies or persons work “in cooperation with” instead of “through” other agencies and persons licensed in different States. They believe this will clarify the fact that agencies are not limited to working only with families in the State(s) in which the agency is licensed. Conversely, a commenter requests that the regulations state that, once an agency is accredited to provide Convention adoption services, it is authorized to provide those services in any U.S. State where it is also licensed under State law. Another commenter believes that a different license should be involved in intercountry placements and that being licensed to place children domestically is not sufficient for placing internationally.

*Response:* We are not making any changes in response to these comments. The Department recognizes that intercountry adoptions in the United States frequently bring together an agency licensed in one State and a family located in a different State. The Convention and the IAA do not change any applicable State requirements that an agency be licensed or otherwise authorized in the State to provide services in the State. Under the IAA and § 96.30(c), to provide adoption services in a Convention case, an agency or person must be: (1) Licensed or

otherwise authorized in each State in which it is providing adoption services; or (2) if it wishes to work in a State in which it is not licensed, work through an agency or person who is licensed or authorized and who is acting as an exempted or supervised provider, or through a public domestic authority of that State. Thus, an agency not licensed in a particular State may provide services to a client in that State, through another agency or person that is licensed or authorized to provide services in that State and additionally is functioning as a supervised provider or an exempted provider or through a public domestic authority.

These regulations are consistent with the IAA, which states explicitly, in section 503(a), that the IAA is not meant to preempt State law unless a provision of State law is inconsistent with the Convention or the IAA.

It will continue to be up to each State to determine if requirements to be licensed to provide adoption services in intercountry cases should be different from requirements to provide services in domestic adoption cases. Regardless of how an individual State resolves this issue, however, an agency or person involved in intercountry adoption services under the Convention will need to comply with these regulations.

2. *Comment:* Two commenters believe that it is essential that agencies and persons be permitted to work with other agencies and persons licensed in different States. They ask that accrediting entities pay close attention to the activity under such relationships, however, so that § 96.30 is followed properly.

*Response:* In deference to the important role that cross-State relationships and networks play in matching children from many different countries of origin with prospective adoptive parent(s) throughout the United States, the regulations allow such relationships to continue. We believe that the regulations also allow appropriate oversight of these relationships, so that no change is needed in response to this comment. The regulations, in particular subpart C, provide for a “primary provider” to be responsible for ensuring that all of the adoption services, as defined in § 96.2, are provided in a Convention case. The primary provider assumes responsibility for its use of supervised providers under the provisions of §§ 96.45 and 96.46, which includes ensuring that those providers are in compliance with applicable State licensing and regulatory requirements in all jurisdictions in which they provide adoption services. Failure to do so may



be grounds for the accrediting entity to take adverse action against the primary provider, and may jeopardize the primary provider's accreditation or approval status. The Department believes that this system will ensure proper monitoring of supervised providers by primary providers.

#### *Section 96.31—Corporate Structure*

1. *Comment:* Several commenters oppose allowing agencies that qualify for nonprofit tax status under State law alone from receiving accreditation. They suggest that only agencies that have qualified for nonprofit tax status under § 501(c)(3) of the Internal Revenue Code should be permitted to become an accredited agency. One commenter requests that the Department bear in mind that several countries already have regulations that would explicitly require U.S. agencies to have nonprofit status and/or tax-exempt status under § 501(c)(3) of the U.S. Tax Code.

*Response:* We left § 96.31(a) of the proposed rule unchanged in the final rule. For accreditation purposes, agencies must have nonprofit status under the laws of any State or must qualify for nonprofit tax treatment under § 501(c)(3) of the Internal Revenue Code. The Department does not believe there is sufficient justification to increase the regulatory burden of the rule by requiring all agencies to obtain nonprofit status under § 501(c)(3) and under State law. Nothing in this rule prohibits agencies from qualifying as a nonprofit under both Federal and State law, if they so choose, and an agency or person will of course have to obtain § 501(c)(3) status if so required by a particular Convention country in which the agency or person wishes to operate.

2. *Comment:* A commenter recommends that attorneys and other individual practitioners be required to be licensed to provide adoption services under State law, rather than only authorized to provide adoption services, in order to become approved persons.

*Response:* The Department declines to change the rule. IAA section 203(b)(1)(G) requires only that nonprofit agencies must be licensed to provide adoption services in at least one State in order to become accredited. Section 203(b)(2) of the IAA does not apply the requirement to have a State license to persons (for-profit agencies and individuals) that seek to become approved. We note that § 96.30(a) requires that persons be authorized by State law to provide adoption services in at least one State, which may have the practical effect of requiring persons

to become licensed, depending on the laws of the State in question.

#### *Section 96.32—Internal Structure and Oversight*

1. *Comment:* Numerous commenters request that agencies and persons be required to include adult adoptees on their boards of directors or other similar governing bodies to provide input on the needs and concerns of the intercountry adoption community.

*Response:* The Department agrees that the standard should encourage accredited agencies and approved persons to have boards of directors that include individuals who understand the concerns of adoptees and other individuals involved in adoptions. Therefore, the Department has amended § 96.32(b) to add a standard that agencies and persons have a board of directors or a similar governing body that, among other things, includes one or more individuals with experience in adoption, including, but not limited to, adoptees, birth parents, prospective adoptive parent(s), and adoptive parents. Articles 11 and 22 of the Convention expressly recognize the importance of having agencies and persons directed and staffed by persons qualified by their ethical standards and by training or experience. We believe that adding this flexible standard is consistent with these articles, and that there is no reason to limit the standard to adoptees.

2. *Comment:* A few commenters emphasize that approved persons should have the same education, adoption service experience, and management credentials that the regulations require of the chief executive officer (CEO) of an agency.

*Response:* Individual approved persons will need to oversee any supervised providers and ensure effective use of resources and coordinated delivery of services. The Department therefore agrees that it is important that they have education, adoption service experience, and management expertise similar to that which we expect of the CEO of an agency. Therefore, the Department has changed § 96.32(a) to apply to situations where the person is an individual.

3. *Comment:* Several commenters suggest that a new standard be added to § 96.32, which would read, "The agency or person has in place appropriate procedures and standards, pursuant to §§ 96.45 and 96.46, for due diligence on selection, monitoring, and oversight of supervised providers." Others are concerned that accrediting entities have sufficient information to check on an agency's or person's past practices.

*Response:* The Department agrees that one of the critical functions that accredited agencies and approved persons will serve is to provide oversight to the supervised providers with whom they work. Therefore, in response to these comments, the Department has added a new standard to the final rule, as § 96.32(d), which reads: "The agency or person has in place procedures and standards, pursuant to §§ 96.45 and 96.46, for the selection, monitoring, and oversight of supervised providers."

We have also added a new standard as § 96.32(e). Section 96.32(e) requires the agency or person to disclose to the accrediting entity any other names by which the agency or person is or has been known, under its current or any former form of organization, and addresses, and phone numbers used when such names were used. It also requires the agency or person to disclose the name, address, and phone number of current directors, managers, and employees, and, if any such individual previously served with another provider of adoption services, the name, address, and phone number of the provider of which they were a director, manager, or employee. Additionally, the rule now requires that the agency or person must provide information on any entity that it currently uses or intends to use as a supervised provider. These modifications to § 96.32(e) will help to ensure that an accrediting entity may investigate an agency's or person's past and present practices, the past and present practices of their directors, managers, and employees, and their selection and oversight of supervised providers.

#### **Financial and Risk Management**

##### *Section 96.33—Budget, Audit, Insurance, and Risk Assessment Requirements*

1. *Comment:* Commenters request clarification of the budget and audit requirements. Some commenters state that annual independent audits are too expensive and burdensome.

*Response:* In response to these comments, the Department has revised § 96.33(a) and § 96.33(b). Subsection (a) requires that the agency or person operates under a budget that discloses all remuneration, regardless of its form, paid to the agency's or person's board of directors, managers, employees, and supervised providers. Agencies and persons should find subsection (b) less burdensome than the proposed rule, in that it now requires annual internal budget review and oversight and independent audits only every four

years. The yearly internal financial review reports must be submitted for inspection by the accrediting entity. We believe these provisions strike a balance between ensuring financial soundness and transparency and reducing the costs of annual external audits.

2. *Comment:* Numerous commenters request that the phrase "independent professional assessment of risks" in § 96.33(g), on insurance coverage, be more clearly defined. Commenters believe that an agency's or person's management, insurance agent, financial, or legal counsel should be allowed to conduct a risk assessment review.

Several commenters are concerned that requiring a review by an independent risk assessment firm will cause undue financial hardship for small agencies and will raise the costs of accreditation and approval. As well, a commenter believes that agencies or persons should not be required to include in a risk assessment an evaluation of the risks of using supervised providers in the United States and abroad. Other commenters believe that an agency or person should be allowed to determine its own level of risk and purchase the amount of insurance that it believes is necessary.

*Response:* The Department has changed the risk assessment standards in response to concerns that the proposed rule was too burdensome. The final rule standard provides for the agency or person to conduct a risk assessment, but no longer provides that the assessment be conducted by an independent professional. An agency's or person's management, insurance agent, financial, or legal counsel may conduct the assessment. Additionally, the assessment must include a review of information on the availability of insurance coverage for Convention-related activities. The agency or person must use the assessment to meet the requirements of § 96.33(h), which requires an agency or person to maintain professional liability insurance in amounts reasonably related to its exposure to risk, and to evaluate what other types of insurance to carry. To conform to changes in §§ 96.45 and 96.46 (removing requirements for assumption of liability for supervised providers) and § 96.39(d) (allowing use of waivers), we have deleted the requirement that the risk assessment include an evaluation of the risks of providing services directly to clients who do not sign blanket waivers of liability and the risks of working with supervised providers. The individual conducting the risk assessment will now have discretion to determine the elements to complete the risk

assessment, including any risks arising from working with supervised providers or requiring clients to sign limited and specific waivers.

The Department recognizes that requiring risk assessments is a change from the current practice of many adoption service providers. The Department is requiring a risk assessment so that the agency or person can use it to determine the appropriate amount of insurance coverage needed to protect families working with accredited agencies and approved persons as well as for the protection of the agencies and persons themselves.

3. *Comment:* Several commenters support the standard on professional liability insurance coverage, but are extremely concerned about the lack of available insurance. Commenters state that insurance coverage options are limited, and coverage can be unaffordable for many agencies or persons. Commenters request that the Department explore alternative means for agencies and persons to obtain insurance coverage. Commenters requested that the Department consider the following suggestions: (1) Agencies and persons self-insuring through the use of a bond account held by a public authority; (2) agencies and persons self-insuring through the purchase of a Certificate of Deposit in the name of the agency and a public authority; (3) establishment by the Department of a federally backed insurance program; (4) establishment of a Federal insurance commission; (5) a Hague insurance commission established to offer insurance coverage at a reasonable rate; and/or (6) an insurance waiver program for agencies and persons who show that they are unable to secure insurance coverage despite attempts to do so.

*Response:* The IAA requires a standard on insurance coverage. The Department understands the concern of many commenters about the availability and affordability of professional liability insurance coverage for adoption service providers, but anticipates that such coverage will become available and affordable as the market responds to the demand the standard will create. These suggestions for developing alternatives to insurance coverage by existing market mechanisms in any event far exceed the authority granted to the Department by the IAA.

4. *Comment:* Several commenters suggest that the Department request that the insurance industry analyze underwriting intercountry adoption insurance policies to parents to increase the likelihood that insurers may be more willing to provide an agency or person insurance coverage as well. Commenters

suggest that the regulations allow prospective adoptive families and agencies and persons to enter into binding arbitration with capped awards in order to limit litigation and thereby encourage insurers to underwrite liability insurance for agencies and persons.

*Response:* The IAA does not give the Department the authority to regulate the insurance industry. Nor does the Department believe it can or should require parents to enter into binding arbitration agreements with agencies or persons. Nothing in the IAA or these regulations would prevent prospective adoptive parent(s) and agencies or persons from agreeing to use binding arbitration as opposed to litigation in the event of a problem, however. Thus it is possible that practices will develop that will respond to some of these suggestions.

5. *Comment:* A commenter recommends that the regulations provide that, if a company provides insurance policies to any nonprofit organizations, it must provide insurance to adoption placement agencies. This commenter perceives that insurance companies discriminate against adoption placement agencies. A commenter requests that insurers be required to consider the differences in the services offered by agencies before determining coverage, such as whether the agencies place orphans or whether they place children whose birth parents consent to an adoption. The commenter also suggests that there should be federally-mandated guidelines to govern fee increases by insurance companies.

*Response:* As noted, the IAA does not give the Department authority to regulate the insurance industry, including the types of coverage insurance companies must provide or the fees charged for insurance.

6. *Comment:* Many commenters believe that the requirement in § 96.33(g) to maintain a minimum of \$1,000,000 per occurrence in insurance is excessive and suggest a lower amount or that an amount not be specified in this rule. Commenters are concerned in particular that the insurance requirements will increase the costs of adoption. Many commenters point out that professional liability insurance is very difficult to obtain; some say that insurance companies commonly refuse coverage to adoption service providers, particularly if the provider has ever been party to a lawsuit, and others state that their coverage was cancelled after just one insurance claim. Those that do have coverage find their insurance premiums to be expensive. Another commenter, however, maintains that

liability insurance coverage is readily available to qualified agencies and persons. Some commenters also agree with the \$1,000,000 per occurrence liability insurance requirement and believe the requirement is essential for the protection of adoptive families. One commenter suggests requiring an umbrella insurance policy instead of an aggregate limits policy.

*Response:* Section 203(b)(1)(E) of the IAA requires that a standard be in force that provides for “adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate.” Therefore, the issue is not whether to have a standard requiring professional negligence insurance (also referred to as professional liability insurance), but what amount is “adequate” and whether additional insurance requirements are “appropriate.” For this reason, the Department is maintaining an insurance standard.

The Department has revised the standard, however, to require that professional liability insurance be maintained in amounts reasonably related to exposure to risk, but in no case in an amount less than \$1,000,000 in the “aggregate.” As discussed at section III, subsection B.1 of the preamble, the Department made this decision after reviewing the range of comments on this issue and engaging a consultant to gather additional information on available insurance coverage and industry practices in underwriting policies. In summary, we now believe that approving a \$1 million aggregate standard instead of \$1 million per occurrence is adequate and appropriate. Setting the standard to require a minimum of \$1 million in the “aggregate” establishes an outer limit on total coverage and not a per incident or claim limit.

Setting the standard only for coverage in the aggregate potentially provides more flexibility to both agencies and persons seeking insurance and the underwriting company to set lower “per occurrence” limits within the \$1 million aggregate coverage, should the market respond by offering policies tailored to the Convention standard. Setting the amount of coverage required in the aggregate at \$1 million, while still requiring that coverage be related to actual risk, also strikes a balance between the burden the insurance standard imposes on agencies and persons seeking to provide Convention adoption services and protecting the interests of birth parents, prospective adoptive parent(s), and children.

The final rule standard in § 96.33(g) continues to require the agency or

person to use a risk assessment to determine the actual amount of professional liability insurance to be maintained under § 96.33(h)—that is, to determine if more coverage than the minimum is appropriate.

7. *Comment:* Some commenters are concerned that specifying an insurance amount will encourage lawsuits for that amount or greater. Another commenter thinks that the insurance requirement will keep agencies and persons from placing special needs children due to fear of increased litigation.

*Response:* As noted, the Department cannot avoid drafting a professional liability insurance standard, because the IAA explicitly requires agencies and persons to have “adequate” professional liability insurance. Requiring a certain amount of insurance coverage in the aggregate, rather than per occurrence, should reduce the likelihood of increased litigation, since plaintiffs will not consider that they can necessarily receive the total amount. The Department does not believe that the insurance requirement will discourage agencies and persons from placing special needs children. If an agency or person is in compliance with the disclosure requirements of § 96.49, then it will disclose to prospective adoptive parent(s) any known special needs of the child, which should help decrease the number of claims against agencies or persons.

8. *Comment:* Commenters are concerned about the cash reserve provision in § 96.33(e). Commenters also seek insertion of the word “charitable” to § 96.33(f).

*Response:* We have reduced the period of time for which the agency or person must maintain on average financial resources to meet its operating expenses to two months. We also changed § 96.33(e) to allow assets, as well as cash reserves and other financial resources, to be taken into account in determining whether the agency is maintaining sufficient financial resources. These changes are meant to reduce the burden that this standard imposes on agencies and persons, while still requiring sound financial practices. We have also amended the standard to require the agency or person to take into account not only its projected volume of cases, but also its size, scope, and financial commitments.

We have also inserted the word “charitable” before donation in § 96.33(f), as we agree that only charitable donations should be accepted under the standard.

9. *Comment:* Some commenters, as noted in other subparts, were concerned about the case transfer procedures, and

the respective roles of accrediting entities and agencies and persons in the transfer of cases.

*Response:* As discussed in detail in the responses to comments on §§ 96.7 (above), 96.77 (below), and 96.87 (below), we have modified a number of provisions in the rule relevant to Convention case transfers in the event that an agency or person is no longer providing services in Convention adoption cases. Our modifications include adding a standard in § 96.33(e) to require that an agency or person must have a plan in place to transfer Convention cases if it ceases to provide or is no longer permitted to provide adoption services in Convention cases. The plan must include provisions for organized closure and reimbursement to clients of funds paid for services not rendered.

#### *Section 96.34—Compensation*

1. *Comment:* A commenter suggests that it is standard practice to pay incentive fees to individuals who refer prospective adoptive parent(s) and questions why commissions, incentives, and contingency fees cannot be paid to a person providing a referral.

*Response:* Section 96.34(a), which is limited to individuals providing intercountry adoption services, does not directly deal with the issue of clients who are paid incentives for referring other potential clients, such as prospective adoptive parent(s), to an agency or person. This practice must conform, however, to the general principle that fees may not be paid if they are made contingent on placing or locating a child for an adoptive placement.

The Convention directs public foreign authorities and public domestic authorities to prevent improper financial gain in connection with an intercountry adoption. Further, section 203(b)(1)(A)(iv) of the IAA specifically bars agencies and persons from retaining personnel on a “contingent fee basis.” Generally speaking, a fee is contingent if it is only paid if an adoption is completed. The standard prohibits contingency fees consistent with the IAA statutory mandate. We are maintaining the prohibition in § 96.34(a), and have clarified that the standard prohibits contingency fees for each child “located” for an adoptive placement, in addition to contingency fees for each child “placed” for adoption.

2. *Comment:* Commenters who would like the financial aspects of the adoption process to be more transparent suggest that agencies or persons be required to account for all revenues and that any

payments made to third-party vendors who are related to a staff member of an agency or person should be required to be reported along with information stating the amount of payment and the type of service rendered. Many other commenters support the proposed compensation regulations stating that they provide reasonable guidance to agencies on how to structure compensation for intercountry adoptions.

*Response:* The Department has maintained the general structure of § 96.34 and has added § 96.34(f), which requires that agencies and persons identify any third-party vendors to whom clients are referred for non-adoption services. The agency or person must disclose any corporate, financial, or familial relationship with such vendor. We have also made a related change to § 96.40(c)(1), setting a standard that requires disclosure of all third-party fees to prospective adoptive parent(s). For more information on the reasons for this modification, see the responses to comments for § 96.40(c).

3. *Comment:* Commenters seek clarification as to whether or not fees-for-services constitute incentive fees. They recommend that employees and supervised providers be paid an hourly rate or salary for services actually rendered, not on a contingency fee basis. Paying employees or supervised providers a regular salary minimizes the incentive for a person to make more referrals to earn higher fees.

*Response:* Fees for adoption services do not constitute incentive fees. We have clarified in § 96.34(a), however, that the standard disallows any contingency fee arrangements related to locating or placing a child for adoption. For further information, see the response to comment 1 for § 96.34.

4. *Comment:* Commenters question what or who will determine whether the fees, wages, and salaries paid to the directors, officers, and employees of an agency or person are “unreasonably high.” One commenter feels that a free enterprise system should determine fees, wages, and salaries. Other commenters recommend that fees, wages, and salaries be evaluated in light of the country’s economy and be commensurate with the cost of living in the country of origin.

*Response:* The concept of “reasonableness” does not lend itself to bright line rules, but rather requires an assessment in light of a variety of relevant factors. We have crafted standards in § 96.34(d) and (e) that identify the factors the Department believes should be considered in determining if fees, wages, or salaries

paid are unreasonably high in relation to services rendered. We have made one change to guide this analysis, requiring that the compensation be judged by taking into account the country in which the adoption services were provided and the relevant norms for compensation within that country, to the extent known to the accrediting entity. We have also added supervised providers to the list of those whose compensation must meet the reasonableness standard of § 96.34(d). We believe this approach, which avoids inappropriately setting caps or range limits on salaries and wages, will be workable, particularly because accrediting entities will often have access to comparable data on agencies and persons under their authority.

### **Ethical Practices and Responsibilities**

#### *Section 96.35—Suitability of Agencies and Persons To Provide Adoption Services Consistent With the Convention*

1. *Comment:* To ensure that the referral process is based on fair, legal, and objective criteria, one commenter requests that the Department monitor the ethical practices of those involved in the referral process.

*Response:* It is difficult to police unethical practices in referrals of children eligible for adoption from countries of origin. Nevertheless, § 96.46 sets out standards that an agency or person must follow in using supervised providers in other countries, including by ensuring that such foreign supervised providers do not engage in practices inconsistent with the Convention’s principles of furthering the best interests of the child and preventing the sale, abduction, exploitation or trafficking of children. See also the responses to comments on § 96.46.

Ultimately, however, it is the responsibility of the country of origin’s competent authorities to ascertain if Article 4 requirements for determining if a child is eligible for adoption have been met. If it appears that the Central Authority or public foreign authorities of a country of origin have improperly referred a child who is not eligible for adoption, then the two Central Authorities (country of origin and receiving country) involved will need to resolve the problem.

2. *Comment:* A commenter requests that language on ethical standards be mandatory. The commenter also wants the Department to make the oversight mechanisms related to specific standards more explicit. Other commenters support the standards on suitability as written. One of these commenters thinks that the proposed

standards will help agencies and persons uphold high ethical practices when providing adoption services.

*Response:* The issue of mandatory standards is discussed in the responses to comments on § 96.27 and at section II, subsection B of the preamble, above. The regulations include numerous ethical standards. The extensive disclosure standards in § 96.35, which remain largely unchanged from the proposed rule, are designed to ensure that agencies and persons are not violating any ethical standards or any of the guiding principles of the Convention or the IAA, except that § 96.35(c) does have new language to clarify that the disclosure requirements for agencies and person require disclosure of information related to individual directors, officers, and employees associated with the agency or person in any operations under a different corporate or professional name. State licensing regulations or other State laws also may contain mandatory ethical standards for agencies, persons, or individuals in certain professions.

3. *Comment:* One commenter requests that the provisions in § 96.35 include any individual working for the agency or person if such individual is involved in any of the “adoption services” defined in § 96.2.

*Response:* Section 96.35(c) requires an agency or person (for its current and any former names) to disclose information about its directors, officers, and employees to the accrediting entity. (Section 96.35(d), as well, requires disclosures from persons who are individual practitioners.) Thus, this standard already requires the disclosures related to individuals providing adoption services requested by this comment. Also, as noted previously, § 96.32(e)(3) now requires that the agency or person disclose the names of any entity it intends to use, or is using, as a supervised provider.

4. *Comment:* Some commenters request that an agency or person be required to disclose any instance in which it lost its license, even for a brief period of time. Other commenters are concerned that agencies and persons providing multiple services will be denied accreditation or approval because their license was suspended or permanently revoked for violations in service areas other than intercountry adoption.

*Response:* The Department has changed § 96.35(b)(1) to delete the word “permanently.” Thus, an agency or person will need to disclose any instances in which it lost the right to provide adoption services for any period of time in any State or country. In

addition, the Department has changed § 96.35(b)(5) to make it clear that an agency or person (under its current or any former names) must disclose to the accrediting entity information on complaints related to the agency's or person's provision of adoption-related services filed with any State, Federal, or foreign regulatory body of which the agency or person was notified. A change was also made to § 96.35(b)(6) to require disclosures of government investigations, criminal or child-abuse charges, or lawsuits related to the provision of child welfare or adoption-related services. We have not changed the requirement that the agency or person disclose any licensing suspensions for cause or sanctions by oversight bodies, as we believe such information will be valuable to the accrediting entity even if the license pertained to another service area.

5. *Comment:* Some commenters recommend that the Department keep the requirement in § 96.35(b)(5) that agencies and persons disclose to accrediting entities any disciplinary actions or written complaints, including the basis and disposition of such complaints, for the past ten years. Other commenters feel that the ten-year requirement is too long and recommend three to five years. Several commenters recommend that agencies and persons have to disclose only substantiated written complaints or lawsuits in which the agency or person was found liable. Commenters are also concerned that unsubstantiated accusations will delay an agency's or person's accreditation/approval application if "written complaint" is not more clearly defined in § 96.35(b)(5). Other commenters are concerned that information about lawsuits will not be disclosed because of confidentiality provisions in any settlement agreements.

*Response:* We have modified § 96.35(b)(5) to limit the disclosure requirement to those written complaints filed with any State or Federal regulatory body and of which the agency or person was notified. The agency or person must still disclose the outcome of all such complaints.

The Department declines to change the ten-year requirement for disclosure of complaints in § 96.35(b)(5), because we believe ten years of information will best allow accrediting entities to make an informed accreditation determination. We also have not changed § 96.35(b)(6), notwithstanding the concern that confidentiality provisions in settlement agreements will prevent disclosure of information about lawsuits. We do not want agencies or persons to be prevented from applying

because another party is unwilling to modify the disclosure provisions of a settlement agreement, and the accrediting entity will have ample authority to determine, on a case-by-case basis, what steps an applicant should be asked to take to provide sufficient information about the basis and disposition of a lawsuit, including seeking a waiver of any confidentiality provisions.

6. *Comment:* One commenter states that the term "malpractice complaint" in proposed rule § 96.35(b)(6) is a subset of "written complaints" in § 96.35(b)(5), while others appear to believe that it is not a duplicative term.

*Response:* The Department has modified § 96.35(b)(6) to delete reference to "malpractice complaints." The requirement to disclose the basis and disposition of lawsuits related to the provision of child welfare or adoption-related services in § 96.35(b)(6) is sufficient to cover malpractice complaints.

7. *Comment:* Commenters are concerned that States, as well as agencies and persons, have not kept sufficient records of every complaint. Commenters suggest that parents send all past complaints to accrediting entities for review. Several commenters request that a central registry be established to record and verify that an agency or person is in good standing.

*Response:* We have revised the standard at § 96.35(b)(5) to limit the complaints that must be disclosed to written complaints over the prior ten-year period that were filed with Federal authorities or public domestic authorities, and of which the agency or person was notified. This is more congruent with the disclosure requirement in § 96.35(b)(6) related to lawsuits and other investigations by governmental authorities, and clarifies that the intent is to require disclosure of complaints filed with regulatory authorities, such as licensing authorities, rather than complaints made directly to the agency or person. We believe the agencies or persons will ordinarily have information about such significant complaints available, even for the period before these regulations take effect.

After the initial round of accreditation/approval has been concluded and the Convention has entered into force, the accrediting entity will also have available to it information on complaints made directly to the agency or person, under § 96.41. This standard requires accredited agencies and approved persons to keep written records of complaints against them as well as the steps taken to investigate

and respond to the complaints. These written records must be made available to the accrediting entities and the Department, upon request.

8. *Comment:* One commenter suggests that agencies and persons evaluate the moral character of their employees, associates, and supervised providers.

*Response:* Section 96.35(c)(5) requires disclosure of businesses or activities that have been or are currently carried out by individual directors, officers, or employees of the agency or person, which are inconsistent with the principles of the Convention. Additionally, § 96.35(b)(9) requires an agency or person to disclose to the accrediting entity their prior or current association, if any, with businesses or activities that are inconsistent with the principles of the Convention. The Department believes these standards provide specific guidance to accredited agencies and approved persons on ethical adoption practices. To the extent that the "moral character" of individual employees is a separate issue, it is beyond the scope of these regulations.

9. *Comment:* Commenters request that background checks be conducted on all employees of an agency or person. One commenter notes that the proposed rule requires that some employees have background checks, and notes that States may not be able to complete criminal background checks and child abuse clearances for such individuals without additional statutory authority.

*Response:* Section 96.35(c)(3) requires an agency or person to disclose to the accrediting entity the results of a criminal background check and child abuse clearance for U.S. employees of agencies or persons who work directly with parent(s) or children, as well as for those in senior management positions (unless such checks have been included in the State licensing process). This requirement furthers the IAA's mandate that the agency or person must have a sufficient number of appropriately trained and qualified personnel.

The accrediting entity must have criminal and child abuse background information for this subgroup of employees to assess if they are capable of safely providing services directly to children and their families. Broadening the group of employees subject to these background checks would not substantially contribute to the accrediting entity's evaluation of the agency's or person's capacity to provide adoption services, however, and would not warrant imposing the financial burden, administrative burden, and other complexities associated with obtaining and considering background

information in the hiring process of all employees.

This regulation of course cannot in itself authorize States to implement criminal background investigations and child abuse clearances. The Department recognizes that, while the use of criminal and child abuse background checks is standard in many States, especially in the context of employees who work with children, other States specify unique parameters and restrictions for obtaining and using criminal background checks. In addition, criminal background checks may invoke protections of other Federal laws, such as the Fair Credit Reporting Act. To be clear, § 96.35(c)(3) does not supersede or supplant any other Federal or State statute or regulation that might otherwise restrict access to or consideration of background checks. If the State criminal background check is unavailable by operation of State law, then the agency or person can so demonstrate.

10. *Comment:* One commenter requests that agencies or persons be required to disclose whether or not they have ever operated under a different corporate name.

*Response:* Both § 96.35(b) and (c) now require disclosures related to operations under a different corporate name, as does § 96.32(e). The Department made these changes so that agencies and persons could not avoid disclosing information by applying for accreditation or approval under a different name than they formerly used. See also responses to comment 3 on § 96.32 and comment 11 on § 96.35.

11. *Comment:* Commenters request that an agency or person be required to disclose any financial irregularities on the part of the agency or person and any of its employees. Commenters recommend that an agency's or person's previous business history be included with its application for accreditation or approval. Commenters also request that agencies and persons be required to disclose any current and past business activities that are inconsistent with the principles of the Convention.

*Response:* We modified the rule to require agencies and persons to make disclosures to accrediting entities about individual directors, officers and employees under not only their current corporate names, but also under any former names. Additionally, § 96.35(c)(2) requires an agency or person to disclose any convictions or current investigations for acts involving financial irregularities by directors, officers, or employees in senior management positions. The Department does not require such disclosure for all

employees because we believe it sufficient to focus on the acts of senior management personnel—that is on those in a position to control and manage the agency's or person's finances. Also, to ensure compliance with the Convention's principles, the regulations have been changed at § 96.35(c)(5) to require disclosure of businesses or activities that are inconsistent with the principles of the Convention and that "have been or are currently" carried out by individual directors, officers, or employees of the agency or person.

12. *Comment:* One commenter believes that social workers, like lawyers, should be required to provide a certificate of good standing from their State licensing authority. If they are not in good standing, the social worker must provide an explanation and supporting documentation. The commenter recommends that any disciplinary action taken against the individual should be immediately reported to the State licensing authority and the accrediting entity.

*Response:* To ensure the high standards of social workers who operate as approved persons and provide Convention adoption services, the Department has added a standard at § 96.35(d)(4) to require social workers seeking approval to provide a certificate of good standing or an explanation, accompanied by relevant documentation, of why he or she is not in good standing, for every jurisdiction in which he or she has been licensed. If an accrediting entity takes adverse action against a social worker acting as an approved person that alters his or her approval status, the accrediting entity must report that adverse action to the State licensing authority, pursuant to revised § 96.77(d).

#### *Section 96.36—Prohibition on Child Buying*

1. *Comment:* A commenter believes that there is already a prohibition against child buying in DHS regulations and asks the reason for re-writing the law.

*Response:* The current DHS prohibition on child buying, codified at 8 CFR 204.3, applies to intercountry adoption procedures, as defined in the INA and DHS regulations. For a standard to be effective in the accreditation/approval context, however, it must be included in the Department's accreditation and approval regulations, 22 CFR Part 96. Otherwise, the standard may not be used as a basis for denying accreditation/approval or taking adverse action. Thus, the standard in § 96.36 is not duplicative. To be consistent with

the DHS regulation, the requirements of § 96.36 are generally the same as those of 8 CFR 204.3.

2. *Comment:* Some commenters request that the regulations stipulate what type of expenses can be paid, and under what circumstances, to avoid coercive situations and to protect children and birth parents. A commenter recommends that there be no expansion in the type of adoption services expenses that can be covered in an individual case. Other commenters are very concerned that the standard not include prohibitions against certain expenses that are permitted or required by countries of origin, to avoid precluding U.S. citizens' eligibility to adopt in certain Convention countries.

*Response:* The Department believes that these concerns are already addressed in the rule, so that no revision is required. First, the standard in § 96.36(a) clearly prohibits agencies and persons from "giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child." This means that, if the intent of any payment is to buy a child or to obtain consents for adoption, then the agency or person has violated this standard. This standard, derived from the current, longstanding DHS regulations at 8 CFR 204.3, protects birth parents, children, and adoptive parents. Regardless of how adoption services fees are described, characterized, or classified, if the fee is remitted as payment for the child, or as an inducement to release the child, then the standard is violated and appropriate action may be taken against an agency or person. The standard takes into account that the country of origin's adoption laws and procedures, not the Department's regulations on U.S. adoption service providers, determine what type of expenses, such as the care of the child or contribution for child protection services, must be covered as part of the adoption services fees. The Convention country of the child's origin has the authority to determine allowable adoption expenses in that country as long as the expenses are consistent with the Convention requirements of Article 4 (consents may not be induced by payment or compensation of any kind) and other requirements are followed. In its role as Central Authority, the Department can, however, communicate any concerns about a country of origin's laws and provisions for allowable adoption services expenses.

Finally, to address the concerns of commenters who believe the broad prohibition against child-buying could

be interpreted by accrediting entities to exclude certain types of fees, such as the charitable contribution required in China, the standard highlights that, if permitted or required by the child's country of origin, reasonable payments for the provision of child welfare and child protection services may be made. The Convention and the IAA do not prohibit contributions to support family and child protection services in Convention countries. If the contribution is not intended to induce an individual to place a child for adoption, it is not inconsistent with these accreditation/approval standards. Therefore, we are not prohibiting a required contribution to an orphanage or State welfare organization in a child's Convention country. In § 96.40(b)(6), however, we do require that the client receive an explanation of the intended use of the contribution and the manner in which the transaction will be recorded and accounted for. Overall, we believe that the standard is responsive to the significant concerns about having the flexibility to take account of Convention country practices while upholding the basic principle against payments for a child.

3. *Comment:* Several commenters believe that setting fee limits for adoption services is the only way to prohibit child buying.

*Response:* Please see § 96.34(a) and (d) and the responses to comments on these sections, above. Although we understand and share the commenters' concerns regarding fee limits, this rule does not set fee caps for adoption services and the Department has no authority under the IAA to set fees for adoption services. Setting caps would be impractical and difficult to enforce, especially if the expectation was that the Department would somehow make countries of origin conform to the Department's fee structure. We would be unable to set fee caps that would take into account all of the variables in the various countries that are involved in Convention adoptions, not to mention the fluctuations in exchange rates and currency values. We do agree, however, that the services the fees relate to should be readily transparent, provided to clients, and subject to accrediting entity oversight. Thus, we have included standards in § 96.40 that require agencies and persons to provide prospective adoptive parent(s) with extensive information on fees and expenses related to the adoption.

4. *Comment:* Several parents wish to ensure that any agency that gives money or other consideration as payment for a child will lose its State license to be an adoption agency.

*Response:* States, not the Federal government, license agencies. Because State law governs licensing issues, we do not have the authority to revoke State licenses. To be responsive to the concerns behind this comment, however, we have modified the standard in § 96.77(d) to make it clear that an accrediting entity must notify the State licensing authority of the agency or person in question if the accrediting entity takes adverse action that impacts the accreditation or approval status of the agency or person.

5. *Comment:* One commenter requests that birth parents be made aware of how to pursue complaints.

*Response:* Under § 96.41(a) agencies and persons must provide contact information for the Complaint Registry to their clients, including birth parents in cases of children emigrating from the United States to a Convention country. Section 96.41(b) also requires agencies and persons to permit any birthparent to lodge complaints about adoption services.

In cases of children immigrating to the United States, the child's Convention country should address birthparent complaints about violations of the Convention. Once a complaint has been lodged with the child's Convention Country, the authorities of that country have the responsibility to investigate the matter and to ensure compliance with the Convention. If the complaint involves a U.S. agency or person, the Central Authority may communicate the complaint directly to the Department, to the Complaint Registry or to the accrediting entity overseeing the agency or person at issue.

6. *Comment:* One commenter requests that all parties involved in an adoption proceeding sign a sworn statement stating how much compensation they received for adoption services as a prerequisite to approval of a petition on behalf of the adopted child to enter the United States. The commenter believes this statement should include a declaration that the parties have not paid any illegal sum to officials or made any other illegal payments.

*Response:* We are making no change in response to this comment. The concern expressed may be addressed, in part, by the fee transparency provisions of the rule, but these regulations governing the accreditation/approval of adoption service providers are not an appropriate vehicle to address the conduct of parents or impose additional requirements on the DHS petition process.

7. *Comment:* One commenter states that it is critical to have defining criteria that will determine what constitutes

"reasonable" payment for services in § 96.36. Another commenter wants no change in the language defining "reasonable payments for activities" because it provides an appropriate level of specification.

*Response:* The Department has not changed the language in § 96.36, setting the standard that payments for necessary activities related to adoption be reasonable, because it mirrors the principles in the Convention and the IAA.

8. *Comment:* One commenter suggests the creation of a central organizing authority that would verify relinquishments before a child is placed in an adoption-related orphanage.

*Response:* This suggestion is beyond the scope of these regulations on accreditation/approval. Pursuant to Article 4 of the Convention, the competent authority in the child's Convention country (depending upon the country of origin, this may be the Central Authority, a court, or other government authority) has the obligation to ensure that consents to an adoption have been given freely and without inducement or compensation of any kind.

9. *Comment:* Two commenters request that the agency or person ensure that employees and agents are aware of the prohibitions of the Foreign Corrupt Practices Act (FCPA) as enumerated at 15 U.S.C. 78-dd. They believe the FCPA has been underutilized and should be employed more often.

*Response:* The FCPA is an anti-bribery statute that agencies and persons already must comply with regardless of these regulations. The Department of Justice is responsible for all criminal enforcement of the FCPA and shares authority over civil enforcement with the Securities and Exchange Commission. We note in response to this comment that, under § 96.72, an accrediting entity must refer to the Attorney General or other law enforcement authorities any substantiated complaints that involve conduct that is in violation of Federal law, an obligation that encompasses the FCPA. We have not added a specific reference to the FCPA in the standards because the standards similarly require agencies and persons to comply with all relevant State and Federal law, again encompassing the FCPA. We note, as well, that the standards on compensation (§ 96.34) and prohibiting child buying (§ 96.36) should help prevent agencies and persons from engaging in behavior that might trigger the FCPA.

10. *Comment:* Several commenters are concerned that the current regulations

provide no complaint or investigative process for handling allegations of abusive practices. They request that monitoring and enforcement procedures be outlined. Commenters request that the Department carefully consider when, how, and by whom investigations will be done to “prevent the abduction, sale of, or traffic in children” and to ensure the regulations provide the tools such investigators need to fulfill these responsibilities.

*Response:* Civil monitoring and enforcement procedures are outlined in detail in subparts J and K of these regulations. Specifically, pursuant to § 96.72, certain substantiated complaints must be reported promptly to the Department, and, as appropriate to State licensing authorities, the Attorney General, or other law enforcement authorities. We share the commenters’ concerns regarding conduct in the child’s country of origin; these issues are discussed in the responses to comments on § 96.46 on foreign providers, and above at section II, subsection D and section III, subsection A.2 of the Preamble.

11. *Comment:* One commenter would like the regulations to place increased responsibility on U.S. agencies and persons to work with supervised providers in Convention countries that do not participate in child buying.

*Response:* The regulations in § 96.46 clearly provide that any agency or person that works with a foreign supervised provider is responsible for requiring that the foreign supervised provider adheres to the standard in § 96.36(a), which prohibits an agency or person from giving money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or entity as payment for the child or as an inducement to release the child.

### Professional Qualifications and Training for Employees

#### Section 96.37—Education and Experience Requirements for Social Service Personnel

1. *Comment:* A commenter is concerned that requiring an agency or person to only use employees to perform adoption-related social service functions will create serious problems for small agencies or persons. Small agencies and persons often hire non-employees to conduct home studies because they do not have the resources to employ full-time social workers.

*Response:* These regulations do not prohibit an agency or person from using independent contractors instead of employees to provide adoption services. It is critical to understand, however,

that any such individuals, regardless of whether they are called contractors, agents, facilitators, assistants, volunteers, etc., are considered as supervised providers if they provide adoption services, unless they qualify as an exempted provider in the United States or perform a service abroad qualifying for verification under § 96.46(c). An agency’s use of supervised providers must adhere to the standards in §§ 96.45 and 96.46.

2. *Comment:* Some commenters request that the “appropriate qualifications” in § 96.37(a) be defined more specifically.

*Response:* We do not think a line-by-line description of credentials for every possible job with any agency or person is necessary. We believe that the accrediting process will permit accrediting entities to compare personnel credentials for covered positions with industry norms to ascertain if the standard set forth in § 96.37(a) has been met.

3. *Comment:* Most, though not all, commenters agree that a master’s degree in social work (MSW), or a related field, is not a necessary qualification for home study preparers, as the proposed rule required at § 96.37(f). Suggestions for a standard on home study preparers’ education and experience ranged from requiring a bachelor’s degree in social work (or another related field) and experience with intercountry adoption, to requiring an MSW, at least four years experience in intercountry adoption, and country-specific training. Others requested that the Department consider a “grandfather” clause in § 96.37(f), like the one in § 96.37(d)(3), to exempt current practitioners from the master’s degree requirement. Other commenters believe that the proposed regulations provided adequate flexibility because agencies or persons could hire MSWs as supervisors or other qualified professionals with an educational background in a related human services field.

*Response:* We have eliminated the master’s degree requirement for home study preparers employed by agencies and persons, because we understand that it may be difficult to retain social workers with a master’s degree in some locations and that requiring professional degrees for all home study preparers would substantially increase salary costs, especially for small agencies. We have changed the regulation so it now requires that such employees be: (1) Licensed or authorized to conduct a home study under the laws of the State in which they practice; (2) in compliance with INA requirements for home study preparers in 8 CFR 204.3(b);

and (3) supervised by an employee of an accredited agency or approved person that meets the educational and experience requirements of § 96.37(d). We have also discussed this change at section III, subsection B.2 of the preamble.

4. *Comment:* Other commenters were concerned that the degree requirements in § 96.37(e) for non-supervisory employees providing adoption services which require the application of clinical skills and judgment are too restrictive.

*Response:* We have modified § 96.37(e) so that non-supervisory employees providing non-exempt adoption services that require the application of clinical skills and judgment must have at least a bachelor’s degree in any field and prior experience in family and children’s services, adoption, or intercountry adoption. Such employees must be supervised by an employee of the accredited agency or approved person who meets the educational and experience requirements in § 96.37(d). This adjustment should enable agencies and persons to recruit and retain the non-supervisory personnel they need to complete Convention adoptions.

5. *Comment:* A commenter is concerned that requiring child background study preparers to hold an MSW or other Master’s degree will hinder Convention adoptions. The commenter believes it will have difficulty finding child background study preparers overseas that can meet this requirement; in its experience, countries from which children are often adopted into the United States rarely have schools of social work, let alone Master’s degree programs.

*Response:* The questioner appears to be referring to an incoming case, in which a child background study would be prepared by a foreign supervised provider or by a foreign provider and verified under § 96.46(c). In such a case, the standards in § 96.37 would not apply to the child background study preparer.

With respect to an employee of a U.S. agency or person, we have revised § 96.37(g) to remove the Master’s degree requirement for employees that prepare child background studies. This change applies to all employees, whether in the United States or abroad. Please see the response to comment 3 on this section, and section III, subsection B.2 of the preamble for further related discussion.

6. *Comment:* A commenter recommends adding a new standard as § 96.37(h), to guard against agencies or persons creating subsidiaries to conduct home studies as exempted providers, to evade hiring personnel that meet the



education and experience requirements in § 96.37, which the commenter appears to believe agencies and persons will find to be too onerous. The commenter believes that a standard is needed to state that when there is overlapping funding, supervision, personnel, or office space between “exempt” home study providers and non-exempt agencies or persons, that the home study providers are not, in fact, exempt.

*Response:* We are not adding a new standard in response to this comment, as we believe that the accrediting entity will have adequate authority under these regulations to determine whether or not an agency or person is improperly evading compliance with the standards in § 96.37 by creating a “shell” exempted provider, and take adverse action as appropriate. The adjustment in the final rule to remove the Master’s degree requirement for home study preparers employed by an agency or person may also address the commenter’s concern that agencies or persons will be tempted to create subsidiaries to try to evade hiring employees that meet the standards in § 96.37.

7. *Comment:* A commenter asks that the Department regulate caseload size. They believe that a caseload of 30–35 should be the absolute maximum for intercountry adoption.

*Response:* While we understand the concern about large caseloads, the Department is not persuaded that a specific caseload limit should be a standard for accreditation or approval. We expect accrediting entities to conduct oversight, pursuant to subpart I, to ensure that an agency or person is providing quality services in substantial compliance with these standards.

#### Section 96.38—Training Requirements for Social Service Personnel

1. *Comment:* A commenter believes that an agency or person must provide new employees training on the Convention, the IAA and Federal regulations, but that such training is unnecessary for licensed social workers who will have significant knowledge in this area.

*Response:* The training requirements in § 96.38 apply to all employees of the agency or person. We believe that training of social services personnel involved in intercountry adoptions is so essential that we also effectively impose the § 96.38 training requirements on supervised providers in the United States, pursuant to § 96.45(b)(2). In recognition of the concern expressed above, however, § 96.38(d) provides that an agency or person may exempt

employees from the elements of the orientation and initial training required by § 96.38(a) and (b) if the employee has demonstrated experience with intercountry adoption, the Convention, and the IAA. We have changed § 96.38(d) to make clear that current as well as newly hired employees may be exempted from training, so that the burden and financial impact of training current employees is limited, and by changing the phrase “prior experience” to “demonstrated experience,” to give agencies and persons flexibility when their newly hired and current employees already have experience with intercountry adoption and knowledge of the Convention and the IAA.

2. *Comment:* Commenters requested that personnel receive balanced training that is uniform and consistent throughout the intercountry adoption community. Specifically, one commenter believes that personnel should be trained about both the positive and negative aspects of intercountry adoption. Another commenter recommends that employee training include a course on ethical considerations in intercountry adoption.

*Response:* We believe that the extensive list of topics that must be covered under § 96.38 will ensure that balanced training is provided. We have added a requirement to § 96.38(a)(5) that the training include a discussion of ethical considerations in intercountry adoption. Section § 96.38(b)(6) also includes a requirement for agencies and persons to provide training on adoption outcomes and the benefits of permanent family placement.

3. *Comment:* Commenters request clarification that, during initial employee training, training in “child, adolescent, and adult development” applies to the development of the adopted child, and does not require training in human development in general.

*Response:* We agree and have clarified § 96.38(b)(10) accordingly.

4. *Comment:* Commenters want to know whether or not the training requirement in § 96.38(c) is in addition to any training that may already be required by their State. If so, commenters state that the regulation would require many employees to perform 30–40 total hours of annual training, with the high costs of such training passed on to prospective adoptive parent(s).

*Response:* We have clarified in § 96.38(c) that continuing education hours required under State law may count toward the training requirement, as long as the training meets the substantive requirements of the

standard by being related to current and emerging adoption practice issues.

5. *Comment:* A commenter asks if the required training courses must be approved or accredited and, if so, what governing body will accredit or approve the courses. Other commenters recommend that employees should be required to document training.

*Response:* Because of the variety of training opportunities and variance in available training opportunities according to geography, the Department has not mandated that training be accredited or approved by any particular entity, and has added documented distance learning courses as another example of an acceptable means to provide training under § 96.38(c). When the accrediting entity evaluates whether an agency and person complies with § 96.38, the agency or person will have to provide some reliable documentation that confirms that employees received (or qualified for exemption from) the required training. The accrediting entity’s on-site evaluators will check both the training records and the content of the training materials used to ensure that they are covering the content areas required under § 96.38. We do not believe, however, that it is necessary in regulations to detail what kind of documentation must be used.

6. *Comment:* One commenter strongly endorses the minimum requirement of twenty hours of training for an agency’s or person’s employees who provide adoption-related services, while others think that twenty hours of annual training is excessive. One commenter proposes a compromise, suggesting a reduction in training hours and/or extending the period to complete the training. Another commenter opposed the training requirements altogether, while still others endorsed the training requirement as written.

*Response:* We are persuaded that requiring thirty hours of training over a two-year period is reasonable and have changed the rule accordingly. Using the time frame of two years provides flexibility, and reducing the hours from twenty per year to approximately fifteen per year reduces the time burden and cost to agencies and persons. At the same time, the standard helps to ensure that those providing social services involving clinical skills and judgment receive ongoing training on adoption practice issues.

7. *Comment:* A commenter requests clarification regarding whether or not staff exempted from initial training are still required to complete the continuing training in § 96.38(c).

*Response:* Staff exempted from orientation training in § 96.38(a) and (b) are still required to complete the training requirement of thirty hours in a two-year period under § 96.38(c). Thus, both new hires that become incumbents and incumbents must get thirty hours of training over each two-year period of their employment with the agency or person.

8. *Comment:* Commenters request that the Central Authority take a greater role in collating and disseminating best practices and translated copies of foreign adoption laws and other adoption related information and establish a resource library as part of its duties under Article 7(2)(a) of the Convention.

*Response:* We understand the need for best practices guides and pamphlets and the interest in a resource library. The Central Authority duties of the Department are, however, outside the scope of these regulations, which lay out the rules regarding accreditation and approval of agencies and persons.

#### **Information Disclosure, Fee Practices and Quality Control Policies and Practices**

##### *Section 96.39—Information Disclosure and Quality Control Practices*

1. *Comment:* Some commenters think that it is unduly burdensome for agencies and persons to provide a sample contract to prospective adoptive parent(s) at initial contact, as required in § 96.39(a). Other commenters support requiring agencies and persons to provide a sample copy of their contract.

*Response:* The adoption services contract contains important information about what an agency or person is agreeing to do and what a client is expected to do in a Convention adoption. The Department believes that the information contained in the adoption services contract is critical for prospective clients to consider at the beginning of the adoption process as they compare agencies and persons and determine which services are available from the different providers. Therefore, the Department is not removing the requirement that agencies and persons provide a sample contract to prospective clients upon initial contact.

The Department has taken steps to reduce the burden on agencies and persons of complying with the standards in § 96.39(a). The Department has removed from § 96.39(a)(1), as redundant, the proposed standard that the agency or person provide a separate explanation of the mutual rights and responsibilities of clients and the agency or person. The Department has

also deleted § 96.39(a)(3), which would have required disclosures of all entities with whom the prospective client could expect to work in the United States and in the child's country of origin and the usual costs associated with their services. Instead, new § 96.39(a)(2) now requires an agency or person to disclose this information to prospective client(s), upon initial contact, only for all supervised providers with whom the prospective client(s) can expect to work.

2. *Comment:* Commenters request that the Department review several contracts and establish a list of permitted or prohibited clauses to create contract uniformity.

*Response:* We have taken no action on this request, as we believe it is beyond the scope of this rule's establishment of accreditation/approval standards. In addition, adoption services contracts must still conform to different individual State laws, which would pose serious challenges to developing one uniform model contract.

3. *Comment:* A commenter requests guidance on how agencies and persons should monitor disruptions and dissolutions, in order to comply with § 96.39(b)(1).

*Response:* Please see the response to comments on § 96.43, which governs the tracking and recording of disruptions and, wherever possible, of dissolutions in Convention adoption cases as required under the IAA for Congressional reporting purposes. In general, the provisions in § 96.39(b)(1) on maintenance and disclosure of disruptions and dissolution statistics to clients mirror § 96.43 and only require agencies or persons to provide the information to clients for the prior three calendar years.

4. *Comment:* Commenters suggest that agencies and persons should also disclose to prospective adoptive parent(s) whether or not any of their current or former clients have been prosecuted for crimes that they committed against their children after the child's adoption.

*Response:* While the Department shares the commenters' concern about parental abuse of adopted children, we have not made this change. The information might suggest a deficiency in the agency or person's screening of adoptive parents, but it is post-adoption information that will not be consistently available, particularly when agencies do not provide significant post-adoption services. In addition, there are other ways in which an accrediting entity can determine whether proper standards are followed in preparing or approving home studies.

5. *Comment:* A commenter believes that data on the number of parents who apply to an agency or person to adopt each year is proprietary information and requests that we remove § 96.39(b)(2) requiring such information be disclosed, if requested, to clients and prospective clients.

*Response:* We are not revising the rule in response to this request. Section 203(b)(1)(v) of the IAA mandates that the "agency discloses fully its policies and practices, the disruption rates of its placements for intercountry adoption, and all fees charged by such agency for intercountry adoption." Data on the number of adoption placements is essential to evaluate data on disruption rates. Data on the number of parents who apply to an agency or person to adopt each year is also important to disclose because, in conjunction with the data on placements, it allows prospective clients to judge the agency's policies and practices with regard to how likely and how quickly it is able to arrange placements.

6. *Comment:* A commenter believes that, because there is no way to account accurately for all children awaiting adoption, agencies or persons should not be required to furnish this number to prospective adoptive parent(s).

*Response:* The Department has changed § 96.39(b)(3) to require that an agency or person make available to prospective adoptive client(s) the number of children eligible for adoption and awaiting an adoptive placement referral via the agency or person. The new language clarifies that an agency or person is only responsible for disclosing the number of children who are awaiting an adoptive placement referral via the agency or person.

7. *Comment:* Many commenters request that § 96.39(d), prohibiting an agency or person from requiring a client to sign a blanket waiver of liability, be omitted. Other commenters request that waivers of liability be prohibited.

*Response:* The Department has deleted the provision prohibiting blanket waivers of liability from § 96.39(d), as discussed in more detail above at section III, subsection B.3 of the preamble. Section § 96.39(d) of the final rule permits an agency or person to require a client to sign a waiver of liability as part of the adoption services contract if that waiver complies with applicable State law. The waiver must also be limited and specific, and based on risks that have been discussed and explained to the client in the written adoption services contract.

8. *Comment:* As well as requesting that waivers be permitted, commenters make a variety of requests related to the

specifics of such voluntary waivers including: (1) That “approved” language be included in voluntary and informed risk waivers; (2) that standard risk waiver forms be developed and used; and/or (3) that country-specific uniform risk waiver forms be mandatory. They believe that, after acknowledging the possible risks, prospective adoptive parent(s) will choose to proceed despite the known obstacles.

*Response:* It is the responsibility of each agency and person to ensure that any waiver complies with applicable State law, and the Department does not intend to mandate any specific waiver form or language. It would be impracticable and inconsistent with its role for the Department to create a risk waiver form for adoptions. To be clear, it is the responsibility of each agency and person to disclose risks to be assumed by the client that are known at the time the adoption services contract is signed. If risk waiver forms are used, the agency or person must take responsibility for the forms in light of the States and Convention countries involved, and any other relevant factors.

9. *Comment:* Several commenters express deep concern about the burden that the disclosure/waiver provisions and quality control practices in § 96.39 will impose on smaller, nonprofit agencies and persons.

*Response:* The Department has tried to balance the concerns of small agencies with the goal of protecting prospective adoptees, prospective adoptive parent(s) and birth parents, all within the context of complying with the requirements set forth by the Convention and the IAA. The Department has changed the language of § 96.39(d) to permit a client to sign a waiver of liability, a revision that should help reduce the impact on small agencies by allowing agencies to allocate risks. We did not delete the other information disclosure requirements in § 96.39, because overall we believe they are necessary to implement section 203(b)(1)(A)(v) of the IAA, or otherwise further the purposes of the IAA and Convention.

10. *Comment:* Several commenters raise concerns about how the accrediting entities and the Department will ensure that agencies and persons permit document review and site evaluations when requested.

*Response:* The Department has clarified the standard in § 96.39(e) so that an agency or person must cooperate with reviews, inspections, and audits by the accrediting entity or the Department. Section 96.25(c) also explicitly provides that accreditation or approval may be denied, or adverse action taken, solely

on the basis that an agency or person did not provide requested documents or information, or did not make employees available.

11. *Comment:* A commenter suggests that, because some Convention countries prohibit the use of the Internet to place children for adoption, agencies and persons should be required to inform the accrediting entities at the time of accreditation or approval if they work in such Convention countries, to ensure compliance with such laws.

*Response:* Each agency or person is responsible for complying with the laws of the Convention country with which it is working, as well as with applicable State and Federal laws. The Department has modified the language in § 96.39(f) to clarify that an agency or person may use the Internet only to place individual children who are eligible for adoption when such use is not prohibited by the State or Federal law or by the laws of the child’s country of origin, and then only under the conditions stated in paragraphs (1)–(4). The Department is not requiring, in § 96.39(f), that agencies and persons inform accrediting entities of the laws of Convention countries, however, because we believe that accrediting entities already have the authority, in their discretion, to request that their accredited agencies and approved persons provide the applicable laws of the Convention countries with whom they work so that they can ensure compliance with such laws.

12. *Comment:* Commenters suggest that a new standard be added to require that agencies and persons provide prospective adoptive parent(s) upon initial contact, a statement that all documents and information referred to in § 96.39 are available to them, and that, if the organization has 501(c)(3) status, they may also obtain IRS Forms 990 and 1023.

*Response:* Section 96.39(a) requires the agency or person to provide significant documents and information to prospective clients upon initial contact. We have changed § 96.39(b) to provide that the agency or person must inform clients or prospective clients of the additional information available under § 96.39(b) and provide it upon request. We believe it is sufficient to disclose the additional information listed in § 96.39(b) only upon request from a client or prospective client, in light of the burden on agencies and persons. We are not adopting the comment as it relates to IRS Forms 990 and 1023, because the rule does not require that an agency or person obtain 501(c)(3) status, and again, do not believe the burden on agencies or

persons is warranted. Nothing in this standard would, however, prohibit the agency or person from choosing to provide additional material upon initial contact, or a prospective client from requesting additional material.

13. *Comment:* One commenter requests that agencies and persons be required to disclose to prospective adoptive parent(s) the criteria by which they determine a child’s suitability for intercountry adoption.

*Response:* We have taken no action in response to this request because, under Article 4 of the Convention, the competent authorities or public foreign authorities of the country of origin determine if a child is eligible for adoption, not the agency or person. In an incoming adoption case, the U.S. agency or person, in accordance with § 96.52(b)(2), is responsible only for obtaining from the Central Authority or other competent authority in the country of origin the child background study, proof that the necessary consents to the child’s adoption have been obtained (per Article 4 of the Convention), and the necessary determination that the prospective placement is in the child’s best interests, and transmitting that information to the prospective adoptive parent(s).

#### *Section 96.40—Fees Policies and Procedures*

1. *Comment:* To enable prospective adoptive parent(s) to compare agencies and persons, many commenters request that agencies and persons be required to provide a detailed breakdown or schedule of all fees and expenses in a clear and understandable format, including a list of all individuals that would be involved in the adoption, the services they would provide and how much they would be paid for services rendered. Several commenters highlight the need to have annotated fees and expenses for all costs associated with caring for children and birth parents prior to finalization of the pending adoption. Other commenters note the importance of detailing expenses and fees owed to third parties not acting as supervised providers. One commenter notes that prospective adoptive parent(s) are at times required to subsidize adoption referrals and assignments of children that foreign agencies have made through informal agreements, private connections, or “inside government relationships.” The commenter cites payments called “foreign fees” requested from adoptive parents that generally exceed \$10,000. The commenter recommends that agencies and persons be required to

break down what is included in this “foreign fee.” Another commenter is concerned that foreign officials require fees for “facilitating” the adoption process. Another commenter requests that the regulations not require a breakdown of expenses but rather list fees in particular Convention countries based on average costs there. Numerous commenters support the regulations as written.

*Response:* Although we have made a few revisions for clarity, the final rule, like the proposed rule, requires agencies and persons to provide a detailed breakdown of fees and expenses for adoption services. Section 96.40(b) requires an agency or person to disclose the expected total fees and estimated expenses for the following categories:

- Home study;
- Adoption expenses in the United States;
- Foreign country program expenses;
- Care of the child;
- Translation and document expenses;

• Fixed contributions that prospective adoptive parent(s) must make to child protection or child welfare service programs in the child’s Convention country or in the United States; and

- Post-placement and post-adoption reports.

In response to concerns about the items covered in the category of foreign country program expenses, we have extracted from that category the costs for the care of the child in the country of origin and listed it in § 96.40(b)(4) as a cost that must be separately identified. We think that identifying this item separately, and listing examples of the types of services that may be covered, will increase transparency in identifying costs that are generally considered part of the foreign country program fee. We have also changed § 96.40(b)(3) to include legal services as an example of foreign country program expenses.

We have also added a category for otherwise undisclosed fees and estimated expenses to § 96.40(c). Section 96.40(c) provides for disclosure of services provided by third parties, and of travel and accommodation expenses arranged by the agency or person, if not disclosed under § 96.40(b). Third-party fees are fees that the agency or person expects that prospective adoptive parent(s) will have to pay directly to a third party, such as a country of origin’s Central Authority. This disclosure standard ensures that an agency or person provides in its disclosure for fees and estimated expenses for payments to Central Authorities, translations, and

documents and that it discloses whether the prospective adoptive parent(s) will be expected to pay these costs directly to third parties (either in the United States or the child’s Convention country), or through the agency or person. This requirement applies regardless of whether the prospective adoptive parent(s) will be billed directly or through the primary provider.

In sum, we believe the final rule provides proper controls on the potential for improper financial gain—a primary goal of the Convention—without imposing unreasonable burdens on agencies and persons. The regulations require a sufficient level of detail about fees and expenses to allow prospective adoptive parent(s) to have a clear understanding of how an agency or person uses fees for services to complete a Convention adoption, thus enabling them to make informed choices when selecting an agency or person to assist with their Convention adoption.

2. *Comment:* A commenter requests that the Department, as the Central Authority, record and track fees to provide a benchmark so that agencies and persons charge similar fees to prospective adoptive parent(s), and that it assess the reasonableness of the fees.

*Response:* Section 104 of the IAA requires the Department to submit an annual report to Congress on numerous aspects of intercountry adoptions. Pursuant to section 104(b)(7) of the IAA, one element of the annual report is the range of adoption fees charged in connection with Convention adoptions involving immigration to the United States and the median of such fees set forth by the country of origin. Thus, the Department will be tracking the general trends in fees. Specific information on the fees charged by an agency or person for Convention adoptions, must be provided by the agency or person to the accrediting entity pursuant to § 96.43(b)(6). Section 96.40 also requires the disclosure of a wide range of fee information to prospective clients and clients, which should allow prospective adoptive parent(s) to compare fees. The IAA does not, however, give either to the Department or the accrediting entities the authority to regulate the level of fees an agency or person charges to clients, for reasonableness or otherwise.

3. *Comment:* A commenter recommends that an agency or person must fully disclose to prospective adoptive parent(s), in the written adoption services contract, information on adoptive parent eligibility criteria, mutual rights and responsibilities of parents, the role of the agency or person, the services to be provided by the

primary provider, the names of supervised providers, its practices, policies and procedures, and its refund policies.

*Response:* The terms to be included in an agency’s or person’s adoption services contract are covered by various sections of the regulations. Collectively, these sections require much of the information the commenter believes should be included. Please see responses to comments 1 and 9 on § 96.39 and to comment 2 on § 96.50. Additionally, § 96.51(b) requires an agency or person to inform prospective adoptive parent(s) in the adoption services contract whether or not the agency or person will provide post-adoption services.

4. *Comment:* One commenter requests that all references to “expenses” be removed from § 96.40(b)(1)–(7). The commenter states that it is very difficult to predict the actual expenses of an individual intercountry adoption because there are so many unknown variables. It suggests that fees be based on the average cost of an adoption in a particular Convention country, rather than expenses. Several other commenters are concerned that the regulations preclude them from providing fee estimates for the overall cost of the intercountry adoption process.

*Response:* The Department agrees that it can be difficult to know the exact cost of each service that is required to complete an individual intercountry adoption. The regulations do not preclude an agency or person from providing a fee estimate for the total, overall cost of the intercountry adoption process. The standards do provide, however, that the total fee charged must include a breakdown, by specified categories, of how the overall fee is used. The Department has devised a standard that requires agencies and persons to categorize the fees and expenses an agency or person expects to charge in a uniform format. The fee categories an agency or person must use are in § 96.40(b) and (c). The rule does not require an agency or person to itemize every specific charge for each listed category. To reinforce this point, the Department is modifying the rule to refer to “expected total fees” and “estimated expenses,” as appropriate, throughout § 96.40.

5. *Comment:* One commenter requests that the rule clearly state that estimated contributions should be a fixed dollar amount or range, not a percentage, unless required by the country of origin.

*Response:* The Department has changed the provision to state that an agency or person must disclose “any

fixed contribution amount or percentage," because it intends this provision to cover circumstances where the law of the country of origin may require the contribution to be determined by a percentage as well as circumstances where the contribution is based on a fixed dollar amount. We recognize that this is not the preference of the commenter, but believe the approach taken is consistent with the IAA, the Convention, and current practices.

6. *Comment:* Commenters request clarification regarding § 96.40 and the refund of fees paid for services not rendered. Commenters are concerned that agencies or persons may decide to classify all fees as nonrefundable. They believe that all fees should be refunded if the adoption is terminated due to agency problems, and if there is no fault on the part of the prospective adoptive parent(s).

*Response:* An agency or person incurs administrative and other expenses even if a child is not ultimately placed with prospective adoptive parent(s). Therefore, the Department is not modifying the rule to prohibit a portion of fees from being nonrefundable. The Department believes that § 96.40(a)'s requirement that agencies and persons disclose up front conditions under which their fees or expenses may be refundable or nonrefundable will allow prospective adoptive parent(s) to make informed choices about which agency or person they want to assist them with a Convention adoption.

7. *Comment:* A commenter thinks that requiring the disclosure of special service fees creates an obligation for an agency or person to specifically identify if the fee is used to support other purposes of the organization, such as cultural programs or scholarships. The commenter believes that, while it is reasonable to disclose this information, it is not practical for an agency or person to account for the use of such funds on a case-by-case basis.

*Response:* The Department believes that it is important to disclose the practice of using a portion of fees to fund special services such as cultural programs for adoptees and their families, but recognizes that it may be impractical to require an agency or person to account for the use of such funds on an individual basis. Accordingly, we have changed the standard at § 96.40(e) (which appeared as § 96.40(d) in the proposed rule) to require, where applicable, "a general description of the programs supported by such funds."

8. *Comment:* Commenters support the standard at § 96.40(f) (which appeared

as § 96.40(e) in the proposed rule) that agencies and persons provide prospective adoptive parent(s) the option to transfer funds overseas to minimize direct cash payments when possible. One commenter would like "minimized" to have a clearer definition in this context and would like a maximum amount specified for direct cash transactions. Another commenter points out that many countries of origin do not have monetary systems that allow direct fund transfers, and that some foreign agencies will not accept electronic transfers.

*Response:* The Department has not modified § 96.40(f) on the transfer of funds. The Department is aware that many of the fees charged by public authorities in Convention countries—for example, for passports, birth certificates, adoption certificates, or court documents—must be paid in cash. For this reason, the standard does not mandate that agencies and persons must only use electronic fund transfers for all transactions or that prospective adoptive parent(s) should not expect to use any cash in the Convention country. Instead, the regulations require agencies and persons to use available methods so that the need for direct cash transactions by prospective adoptive parent(s) is minimized. It would not be practicable to set a maximum amount for such transactions, given the variances between Convention countries.

9. *Comment:* A commenter is concerned about the standard in § 96.40(g) (which appeared as § 96.40(f) in the proposed rule), allowing agencies or persons to expend up to \$800 in additional, undisclosed fees and expenses, without specific consent of the prospective adoptive parent(s). As well, the commenter suggests that the standard should restrict the number of times an agency or person can obtain consent to expend funds in excess of \$800 on unforeseen additional fees and expenses, even if the prospective adoptive parent(s) have waived the notice and consent requirement for such expenditures in advance. Two commenters suggest that the standard may be inconsistent with the IAA requirement that agencies and persons disclose fully all fees charged. They believe the standard should require all fees to be disclosed in advance, with no last minute fee increases.

*Response:* The Department shares the commenters concerns about charging large, last minute fees that were not disclosed to the clients in advance. Nevertheless, it is not unusual in an intercountry adoption for unexpected expenses to arise in the country of origin. It would be unreasonable to

require agencies and persons to absorb the costs of all unforeseen expenses that may arise in all Convention adoptions. Therefore, the regulations attempt to strike a balance between protecting prospective adoptive parent(s) from large, undisclosed fees and allowing agencies and persons some flexibility to handle unforeseen circumstances that may arise in their Convention adoption cases.

Thus, the final rule requires that, to charge fees or expenses that were not disclosed in the written adoption services contract, an agency or person must obtain the consent of the prospective adoptive parent(s) prior to expending any funds in excess of \$1,000 (increased from \$800 in the proposed rule) for which the agency or person will hold the prospective adoptive parent(s) responsible, or give the prospective adoptive parent(s) the opportunity to waive the notice and consent requirement in advance. The Department is satisfied that this approach is not inconsistent with the IAA. The amount requiring either notice and consent or advance waiver was increased from \$800 to \$1000, to provide flexibility, and minimize the burden of seeking consent.

10. *Comment:* Commenters feel that agencies and persons should provide receipts for domestic fees and expenses only, and should not be expected to provide receipts for fees and expenses paid in the Convention country as proposed in § 96.40(f)(3) of the proposed rule, which is now § 96.40(g)(3). A commenter recommends that written receipts should be provided for fees and expenses collected directly by the agency or person. One commenter supports the regulation requiring agencies and persons to provide receipts so that all funds can be accounted for. The commenter is concerned that agencies and persons will decide to have money paid directly to hired contractors to avoid giving receipts.

*Response:* The final rule requires that agencies and persons provide receipts for unforeseen Convention country fees and expenses, because otherwise agencies and persons would not have to account at all to their clients for these expenses. The Department has changed the standard in § 96.40(g)(3), however, so that an agency or person is only required to provide written receipts for unforeseen additional fees and expenses incurred in the Convention country that were "paid directly by the agency or person" in the Convention country. As discussed previously, the Department has also added new § 96.40(c)(1), which requires agencies and persons to disclose fees and estimated expenses for

services provided by a third party that will be paid directly by the prospective adoptive parent(s). The Department also notes that §§ 96.45(b)(6) and 96.46(b)(8) require that a primary provider require that its supervised providers provide clients with an itemized bill of all fees and expenses to be paid, if the supervised providers bill the clients directly.

11. *Comment:* Commenters request that the word “prospective” be removed from § 96.40(g) (which appeared as § 96.40(f) in the proposed rule). Commenters believe that adoptive parent(s) are no longer prospective at this stage in the adoption process. Others request that the regulations remain as written.

*Response:* Section 96.40(g) addresses, in part, unforeseen fees that may occur before an adoption is finalized, either in the Convention country or in the United States. Therefore, the Department believes that the use of the phrase “prospective” adoptive parent(s) is appropriate.

12. *Comment:* A commenter thinks that § 96.40(g) of the proposed rule, which required an accounting of “fees and expenses incurred within thirty days of completion of delivery of the services” requires agencies and persons to reiterate detailed information about fees that has already been provided. The commenter believes it is unclear whether this rule is asking an agency or person to substantiate the fees that were charged for services rendered. It also thinks that § 96.40(g) of the proposed rule, requiring an accounting, should be removed or that the deadline should be extended from thirty to sixty days.

*Response:* The Department agrees that requiring an accounting is redundant and, therefore, has deleted § 96.40(g) of the proposed rule from the final rule. In further response to this comment, we have extended the time frame for agencies and persons to refund fees, which appears in § 96.40(h), from thirty days to sixty days to minimize the burden arising from this standard.

### Responding to Complaints and Records and Reports Management

#### Section 96.41—Procedures for Responding to Complaints and Improving Service Delivery

1. *Comment:* Several commenters are concerned that the regulations leave agencies and persons vulnerable to complaints about activities outside the scope of their work. To safeguard agencies and persons from such complaints, one commenter suggests this section be changed to require that the complaint be related to the IAA.

*Response:* The Department has not changed the language from the proposed regulation as requested. Section 96.41(b) makes clear that only complaints that raise an issue of compliance by the agency or person with the Convention, the IAA, or the regulations implementing the IAA are within the scope of the standard. This broader scope encompassing the Convention and these regulations, as well as the IAA, is appropriate. The Department has changed § 96.41(b) so that the description of the type of complaints an agency or person must accept mirrors the description of the type of complaints that the accrediting entities will process, in § 96.68. See also the response to comment 1 in § 96.69.

In addition, § 96.41 has also been revised to clarify that references to complaints in other paragraphs of § 96.41 refer back to complaints filed pursuant to § 96.41(b).

2. *Comment:* Several commenters would like “post-adoptive parent” added to the list of those qualified to lodge a complaint. They believe that otherwise the provision could exclude the many parents who waited until their adoptions were complete before making complaints to the appropriate authorities.

*Response:* We have changed § 96.41(b) to refer also to adoptive parents.

3. *Comment:* Several commenters would like the regulations to clarify what constitutes a complaint, so that the number of frivolous complaints will be limited. They recommend that the term “complaint” be defined. Several commenters suggest that a complaint be defined as a written document, which is signed, and which addresses a specific aspect of a service that is under the control of the agency or person and governed by the regulations. One commenter further requests the section be amended to reflect that anonymous complaints may not be filed. Another commenter would like to see the regulations protect the confidentiality of those who make complaints.

*Response:* We understand that agencies and persons are concerned about being held accountable for problems that are not within their control. Section 96.41(b) details the components of complaints that an agency or person will be held accountable for addressing, stating that such complaints must be dated and signed by a birthparent, a prospective adoptive parent, an adoptive parent, or an adoptee. Furthermore, the complaint must refer to services or activities of the agency or person (including its use of a supervised provider) that the complainant believes raise an issue of

compliance with the Convention, the IAA, and/or the regulations implementing the IAA. We have also changed § 96.41 to make clear that the obligations set forth in this standard (with respect to the processing, recording and reporting of complaints) relate only to those complaints that are received pursuant to § 96.41(b). Therefore, we do not believe it is necessary to add a definition of “complaint” to the rule.

4. *Comment:* Some commenters are concerned that agencies might disregard § 96.41’s standard forbidding retaliatory action against those who file complaints. Several commenters recommend that the Department add provisions for severe penalties to be assessed against any agency violating the prohibition on retaliation. Other commenters think that the regulation forbidding retaliatory action is adequate as written.

*Response:* We concur with those commenters who find § 96.41(e) adequate. If an agency or person disregards the prohibition against retaliatory action, complainants have the option of filing a complaint with the Complaint Registry, for referral of the alleged misconduct to the accrediting entity. The accrediting entity may take adverse action as necessary. To further add to the protection of individuals who complain against an agency or person, however, we have made a minor change to § 96.41(e) so that it explicitly prohibits an agency or person from retaliating against an individual for providing information to an accrediting entity on the agency’s or person’s performance. See also the response to comment 3 in § 96.69.

5. *Comment:* Two commenters are concerned that requiring agencies and persons to summarize complaints and corrective actions on a quarterly basis places too heavy a burden on agencies. They recommend the Department eliminate that requirement. One of the commenters believes semi-annual or annual reporting would be more appropriate.

*Response:* Because of its value as an oversight tool, we are keeping the requirement that agencies and persons must provide a summary of complaints to the accrediting entity and the Department, but we have amended the regulation to require semi-annual reporting rather than quarterly reporting.

6. *Comment:* Many commenters suggest that individuals should be able to file complaints directly with the Complaint Registry, not just with the adoption agency or person. Other commenters believe complainants

should try to resolve issues through the complaint process of an agency or person before filing with the Complaint Registry.

*Response:* With the limited exception of complaints brought by individuals who are not party to the specific Convention case, we have not accepted the recommendation to allow complainants to file complaints directly with the Complaint Registry. An individual who is a party to a specific Convention adoption case must lodge any complaint relating to that case first with the agency or person providing adoption services, if a U.S. provider, and the primary provider, if different, in order to give the agency or person an opportunity to resolve the issue. For a discussion of the complaint process, please see the responses to comments 2, 3, and 4 in § 96.69.

7. *Comment:* One commenter wonders if there should be a deadline after an adoption has taken place for adoptive parents to file a complaint about adoption services.

*Response:* Although we want to encourage complainants to address issues in a timely manner, we are reluctant to place an arbitrary time limit on complaints in these regulations, which regulate the accreditation and approval of agencies and persons. We have not changed the proposed rule in response to this request.

8. *Comment:* Several commenters would like to ensure the complaint process is transparent to the public. One commenter says that an agency or person should be required to post on its website the periodic reports summarizing complaints that they send to the accrediting entity. One commenter requests that the regulations include a provision stating that adoption agencies and persons must disclose, pre-referral, any complaints that have been directed against the agency or person.

*Response:* The Department believes that the rule's provisions on complaint resolution provide adequate transparency with respect to complaints, and is not making any change in response to these comments. If a complainant is dissatisfied with the resolution of a complaint by an agency or person, the complainant may file a complaint with the relevant accrediting entity through the Complaint Registry, as described in subpart J. Once the Convention is in force, the information dissemination requirements of subpart M will require disclosure to the public of information related to substantiated complaints and thereby keep the public adequately informed about complaints against agencies and persons.

9. *Comment:* One commenter would like the regulations to include a provision requiring agencies to educate prospective adoptive parent(s) about the complaint process. Another commenter suggests an independent entity should be created to educate adoption clients and monitor complaint trends.

*Response:* The regulation requires agencies and persons to provide their clients information regarding the complaint process, including contact information for the Complaint Registry, at the time the adoption contract is signed. Also, we have added to § 96.41(b) a requirement that the agency or person advise complainants of procedures available to them if they are dissatisfied with the agency's or person's response to their complaint (which may include any internal appeals process, or information on filing complaints with the Complaint Registry). We feel that the standard requires adequate notice to prospective adoptive parent(s) about complaint procedures. We are hopeful that information about the Complaint Registry will be disseminated widely, through various channels (including the Department's Web site, accrediting entities' Web sites, advocacy groups, adoption support groups, and adoption Web sites) so that the notice provided by the agency or person will reinforce information already publicly available to prospective adoptive parent(s).

10. *Comment:* A commenter recommends that the Department add a standard providing that "where the agency or person is acting as the primary provider, the procedures specified in § 96.41(a) through (h) [concerning responding to complaints and improving services delivery] include any and all complaint(s) relating to both the primary provider and to any and all supervised provider(s)."

*Response:* We find the change unnecessary. A complaint that a primary provider using supervised providers had not ensured that adoption services were provided consistent with the IAA and these regulations is included within the types of complaints that may be filed with the agency or person under § 96.41(b), or with the accrediting entity via the Complaint Registry pursuant to subpart J. In addition, § 96.45(b)(2) requires primary providers to ensure that their domestic supervised providers comply with § 96.41(b) through (e).

11. *Comment:* One commenter requests that birth parents be made aware of how to pursue complaints.

*Response:* Please see the response to comment 5 on § 96.36, above, which addresses this comment.

#### *Section 96.42—Retention, Preservation, and Disclosure of Adoption Records*

1. *Comment:* Some commenters believe that § 96.42(a) should specify a uniform Federal time frame for the retention of adoption records. Several commenters object to the use of individual State laws to govern the retention of adoption records. Several other commenters request that adoption records be retained permanently because future children and relatives—in addition to the adoptee—have an interest in the adoption records. Other commenters suggest a minimum retention period range from 75 to 100 years.

*Response:* In the proposed rule, the Department deferred entirely to State law in the standard for retention of adoption records. Section 401(a) of the IAA focuses on the preservation of Convention records. (See the final rule for part 98 of Title 22 of the CFR published today in the **Federal Register**.) Convention records are those records in custody of DHS and the Department. The Department wants to stress that adoption records are different from Convention records. Adoption records are records that are received or maintained by agencies, persons, or domestic public authorities. The IAA is silent on whether or not there should be an accreditation standard on retention of adoption records.

We understand the concerns regarding deference to State laws, as State retention requirements on preservation of records may vary. Section 96.42(a) of the final rule, nevertheless, continues to set a standard that requires that agencies and persons preserve adoption records for as long as State law requires. Consistency with State law enhances agencies' and persons' ability to comply with these regulations and minimizes the burden of storing records for periods beyond what is already required under State law.

2. *Comment:* Some commenters would like to see a Federal agency, not agencies or persons, retain adoption records because agencies or persons may cease operations and records may be lost. Some commenters request that adoption records in the custody of agencies and persons be accessible through FOIA. Other commenters suggest that adoption records should be retained in a national archive. Another commenter believes that adoption records for adoptions finalized in a Convention country should be accessible through FOIA.

*Response:* We are not making any change to § 96.42 in response to these comments. Section 401(c) of the IAA mandates that applicable State law continue to govern disclosure, access, and penalties for unlawful disclosure of adoption records. By making the Department or some other Federal agency custodian of adoption records, we would be federalizing a function that Congress determined in section 401 of the IAA to be better regulated at the State level. In addition, attempting to establish a Federal records depository for non-Federal records would raise a host of legal, management, and funding issues. Finally, the Department does not have the authority to require countries of origin to retain adoption records. The laws of the country of origin govern access to and preservation of records that are maintained by its public foreign authorities.

3. *Comment:* A commenter requests that the proposed regulations specify, with a strict definition, which adoption records must be retained.

*Response:* The definition of adoption record is found in § 96.2. It includes, but is not limited to, “photographs, videos, correspondence, personal effects, medical and social information and any other information about the child” received or maintained by agencies and persons or public domestic authorities. The definition includes a range of types of materials to make it clear that agencies and persons must retain all information about the child that comes into their custody. We do not believe that the definition of an “adoption record” must be changed.

4. *Comment:* One commenter requests that the regulations outline strict enforceable regulations on the physical maintenance, storage, and retention of adoption records based on established and professional archival standards.

*Response:* We have changed § 96.42(a) to state that the agency or person must retain or archive adoption records in a safe, secure, and retrievable manner.

5. *Comment:* Several commenters request that the regulations clarify that the State law that applies to adoption records is the law of the State in which the agency or person is physically located.

*Response:* We have not made this change because, in providing that “applicable State law” will govern disclosure of, access to, and penalties for unlawful disclosure of adoption records, IAA section 401(c) is silent on which State’s law is “applicable.” State conflicts-of-laws rules thus would determine which State law is applicable, if the question should arise.

6. *Comment:* One commenter requests the establishment of an international registry that requires both the adoptee and birth parents to consent to release of records before adoption records may be disclosed.

*Response:* We decline to make any change in response to this comment, which is beyond the scope of these accreditation/approval regulations. Section 401(c) of the IAA makes it clear that access to adoption records in the United States will be governed by applicable State law.

7. *Comment:* Several commenters express concern about the access that adopted persons and their families will have to their adoption records. They would like the regulations to make adoption records available to adopted persons and their families at minimal or no cost. One commenter adds that agencies and persons should be required to respond to record requests in a timely fashion. It requests that the regulations clarify which information can be given to the adopted person or family, when it can be given, and how it must be requested. It further requests regulations regarding access to records generated in countries of origin.

*Response:* We are making no change in response to these comments. Under section 401(c) of the IAA, access to adoption records is governed by State law, including State law on costs and timing of access to adoption records. Laws governing specific issues related to access to adoption records vary from State to State. Access to Convention records will be governed by applicable Federal law, including the FOIA and the Privacy Act.

8. *Comment:* Several commenters were confused about whether §§ 96.42(c) and (d) of the proposed rule, regarding disclosure of information and protection of privacy, were meant to preempt State laws on disclosure. Some commenters worried that these sections were creating a Federal law on access to information about adoptees’ and birth parents’ identities. Of those commenters, several were concerned that § 96.42(c) did not adequately protect the privacy of adoptees, birth parents, and prospective adoptive parent(s). Others were concerned that § 96.42(d) would inappropriately block access to adoption records.

*Response:* Section 96.42(c) in the proposed rule was not meant to preempt State laws regarding disclosure, privacy protection, or access to adoption records or other information. The proposed rule standard specifically referenced applicable State law. Likewise, § 96.42(d) in the proposed rule was not intended to change applicable State law

on access to adoption records or to block access to adoption records by birth parents, adoptees, or adoptive parents otherwise permitted by State law.

To clarify and avoid confusion, however, we have deleted proposed §§ 96.42(c) and (d) from the final rule, with the exception of the requirement that the agency or person “safeguards sensitive information,” which is a standard required by IAA section 203(b)(1)(D)(iii). This standard has been relocated to § 96.42(c) of the final rule (§ 96.42(e) of the proposed rule). Agencies and persons must still comply with applicable State law on access to adoption records. Consistent with this, § 96.42(a) clearly defers to applicable State law as the basis for the standard for retaining and archiving adoption records.

#### *Section 96.43—Case Tracking, Data Management, and Reporting*

1. *Comment:* A commenter agrees with the principle of requiring reports by primary providers. The commenter also believes that requiring annual reports would be too costly and time consuming. It requests that these reports be submitted every two years instead.

*Response:* Section 104 of the IAA requires the Department to submit an annual detailed report including the data outlined in § 96.43 of this regulation. The information collected by the primary providers, and provided to the accrediting entity or Department, is used to fulfill the Department’s responsibilities under the IAA. Therefore we have not changed the requirement for agencies and persons to report on the elements in § 96.43 on an annual basis.

2. *Comment:* One commenter suggests that agencies and persons be required to report on the ethnicity of the child and birth parents for cases involving children immigrating to the U.S. and those emigrating from the U.S.

*Response:* Section 104 of the IAA lists the required data to be collected and reported by the Department regarding Convention (and in some cases non-Convention) adoptions. The language of § 96.43 of these regulations generally mirrors the data requirements in the IAA. The IAA has no requirement to report the ethnicity of the child or the birth parents, and we are unconvinced of the need for such a requirement. In the interests of reducing reporting burdens on agencies and persons, we decline to insert such a requirement into these regulations.

3. *Comment:* A commenter suggests that, for every child emigrating from the United States, an agency or person be



required to provide a statement that the placement is being made in compliance with the Indian Child Welfare Act and either that the child is not a Native American or that the tribe has been notified and permission for an out-of-country placement has been received.

*Response:* There is already a requirement that agencies and persons comply with all applicable requirements of the Indian Child Welfare Act, in § 96.54 of these regulations. The accrediting entity will determine the documentation necessary to evaluate compliance with this standard. We have not specified that compliance with this particular standard will be established by a written statement; as with all of the standards, the accrediting entity will decide what documentation and information is necessary to measure compliance.

4. *Comment:* A commenter believes that information about disruptions and dissolutions should be tracked regardless of whether a child is subsequently placed with another family in another country or in the United States.

*Response:* We are making no change in response to this comment. Section 96.43 already requires an agency or person to provide information on disrupted adoptions regardless of whether a child is placed with another family. Agencies and persons are required to provide the same information on dissolved adoptions wherever possible. The Department has qualified the requirements for tracking information on dissolved adoptions with the phrase “wherever possible” because we recognize that agencies and persons may not be able easily to get information about what happens to a child after an adoption is completed.

5. *Comment:* A commenter believes a child’s records should include the name of the individual(s) who performed the home study for the prospective adoptive parent(s).

*Response:* The IAA does not require the name of the individual who performed the home study to be included in a child’s records, and the Department does not believe it is necessary to impose such a rule.

6. *Comment:* Two commenters believe agencies and persons should report if they have ever operated under a different name or if their principals have ever worked with different agencies or persons.

*Response:* Agencies and persons are required to provide information about operations under different names pursuant to §§ 96.32 and 96.35 of these regulations. Section 96.32(e) requires agencies and persons to disclose to the

accrediting entity if directors, managers, or employees previously worked with other providers of adoption services. In addition, we have added to § 96.35(c)(5) a standard that agencies and persons must report if their individual officers, directors, or employees are known to have been or currently are carrying out activities that are inconsistent with the principles of the Convention. It is, therefore, unnecessary to have a similar reporting requirement in § 96.43.

### Service Planning and Delivery

#### Section 96.44—Acting as Primary Provider

#### Section 96.45—Using Supervised Providers in the United States

#### Section 96.46—Using Providers in Convention Countries

1. *Comment:* Most commenters have strong reactions to the regulations governing the responsibilities of primary providers. Many commenters believe that requiring primary providers to assume responsibility for the actions of supervised providers—both U.S. and foreign—would prove to be unworkable. On the other hand, other commenters believe that making primary providers liable for the actions of supervised providers, if those actions were negligent, is essential to ensuring the protection of children, birth parents, and adoptive parents. Numerous commenters believe that the liability provisions in §§ 96.45 and 96.46 of the proposed rule should be stricken. Many of the commenters support the regulations as a framework for working with supervised providers, absent the liability provisions. Commenters state in particular that assigning liability to a single primary provider places an unmanageable financial burden on agencies and persons who serve as primary providers. Other commenters believe that small agencies and social workers who would serve as supervised providers will be forced out of practice because primary providers will be unwilling to accept legal responsibility for their work.

Several commenters recommend that, if the final regulations contain liability provisions, the Department should limit liability through caps on damages, limits on attorney fees, the imposition of a statute of limitations in Convention cases, and a realistic standard of proof for agencies in Convention cases. Other commenters recommend that the regulations provide for liability exemptions for primary providers who can demonstrate “due diligence” in the selection and oversight of their supervised providers. Many

commenters assume that the liability provisions impose a strict liability scheme and exceed the statutory authority provided in the IAA. There are some commenters who support the liability provisions in the regulations, however. These commenters request that the section remain unchanged. Some commenters would like primary providers to be required to treat entities accredited by Convention countries as supervised providers.

*Response:* The Department has addressed, at section III, subsection B.4 of the preamble, above, these comments and its decision to remove the provisions of the proposed rule that required the primary provider to retain legal responsibility for the adoption services provided by, and assume liability for, its supervised providers. Consistent with that discussion, the Department has deleted proposed rule provisions §§ 96.45(b)(8), 96.45(c), 96.45(d), 96.46(b)(9), 96.46(c), and 96.46(d). The regulations as now revised are in no way intended to allocate the risk of tort liability between a primary provider and a supervised provider. Instead, they focus on the primary provider’s responsibility, in the accreditation/approval context, for the actions of its supervised providers to the extent that such actions reveal the primary provider’s non-compliance with a specific standard under §§ 96.45 or 96.46 (a) or (b).

As explained above, at section III, subsection B.4 of the preamble, although we have removed the provisions requiring primary providers to assume legal responsibility for the actions of their supervised providers, we have expanded the types of providers that primary providers must supervise. The Department has revised § 96.14 to require a U.S. accredited agency or approved person acting as a primary provider to treat other U.S. accredited agencies and approved persons providing services on the case in the United States as supervised providers (§ 96.14(b)(1)), and to treat foreign entities accredited by a Convention country as supervised providers (§ 96.14(c)(2)) unless they are performing a service qualifying for verification under § 96.46(c). The Department believes that holding primary providers responsible through the accreditation/approval process for accredited providers assisting with a case will provide an incentive to the primary partner to choose any provider partner carefully, offsetting the deletion of the requirement allocating legal responsibility for the conduct of supervised providers to the primary provider.

In addition, the Department has added language to § 96.46(a)(5) that requires a primary provider to ensure that a foreign supervised provider is accredited in the Convention country in which it operates, if accreditation is required by the laws of that Convention country to perform the adoption services the foreign supervised provider is providing.

As explained in section III, subsection A above, § 96.46(c) now recognizes that contemporaneous supervision by a U.S. accredited agency or approved person will generally not be possible with respect to a limited number of services performed in Convention countries—obtaining consents and preparing child background studies in incoming cases (child immigrating to the United States), and preparing home studies in outgoing cases (child emigrating from the United States)—and accordingly allows the U.S. primary provider the option of verifying after the fact that such services were obtained in accordance with applicable foreign law and the Convention. At a minimum, such steps will require review of the relevant reports and documentation to ascertain that applicable requirements have been satisfied. Section 96.44 has also been revised to conform to this change in § 96.46.

Overall, the modifications that the Department has made to the regulations do not change the basic framework that was set up in the proposed rule. Agencies and persons acting as primary providers will continue to be responsible for monitoring the compliance of supervised providers and the accreditation and approval process will serve as a check on this responsibility. Primary providers will not, however, be required by these regulations to assume legal responsibility for the acts of their supervised providers. The Department believes this structure will promote compliance with the Convention, the IAA, and these regulations, without making it prohibitively difficult for accredited agencies and approved persons to work with other agencies and persons in the United States or with providers in Convention countries.

2. *Comment:* Several commenters maintain that the indemnification provisions outlined in §§ 96.45(d) and 96.46(d) do little to protect the primary provider. Some commenters state that the primary provider could be out of business before it has the chance to seek indemnification against the supervised providers. Commenters also contend that many supervised providers would not have the resources to fulfill the indemnification obligation.

*Response:* As explained above, the Department has removed the requirements that primary providers assume legal responsibility for the actions of the supervised providers operating under their supervision. Therefore, the regulations' indemnification standards are no longer necessary, and the Department has deleted §§ 96.45(d) and 96.46(d).

3. *Comment:* Several commenters point out that prospective adoptive parent(s) decide which agencies and persons to use for certain adoption services. For instance, prospective adoptive families often complete a home study before they even approach an agency. Commenters request that the supervision provisions be modified to reflect such situations.

*Response:* The Department understands the concern about providers selected by prospective adoptive parent(s). Under this rule, however, an accredited agency, temporarily accredited agency, or approved person will have to be identified and act as the primary provider in each Convention case. This primary provider, as identified under § 96.14, is responsible for the provision of adoption services in the case as provided in § 96.44. Providers who do not comply with this framework will not be able to provide services to prospective adoptive parent(s).

With respect to prospective adoptive parent(s) in the United States who have a home study completed before choosing a primary provider, if the home study was prepared by an exempted provider, the primary provider will be required to ensure that the home study is approved consistent with § 96.47(c). The same is true with regard to exempted providers performing child background studies.

With respect to child background and home studies prepared in Convention countries, §§ 96.44 and 96.46(c) will allow the U.S. primary provider to verify the performance of the service, as discussed above at section III, subsection A, and in response to comment one above.

4. *Comment:* Two commenters point out that the term “supervised” has ramifications for agencies and persons because of the distinctions made by the Internal Revenue Code between employees and independent contractors. The commenters request that this differentiation be reflected in the final regulations. The commenters also request that the regulations clarify that they do not prevent an agency or person from employing an independent contractor.

*Response:* The Department does not intend the use of the IAA term “supervised” to determine the treatment of any individual or entity under the U.S. Internal Revenue Code. Supervised providers may be independent contractors. For Convention and IAA purposes only, a supervised provider is an agency or person that is providing adoption services under the supervision and responsibility of an accredited agency, temporarily accredited agency, or approved person that is acting as the primary provider in the Convention case. The term “supervised provider” is too deeply embedded in these regulations to warrant devising a different term to avoid a misperception that the term has any implications for tax purposes.

5. *Comment:* A commenter recommends that the regulations require primary providers to be directly responsible for all fee issues.

*Response:* The Department appreciates the concern that some supervised providers will charge additional and undisclosed fees to prospective adoptive parent(s) when working directly with the prospective adoptive parent(s). The regulations, as written, should help to control this problem, because the standards in both § 96.45 and § 96.46 impose specific requirements for fee-related provisions that must appear in the written agreement between the primary and supervised provider. Section 96.46(b)(8), for example, requires that the written agreement between the primary provider and the foreign supervised provider specify that, if the foreign supervised provider is billing the client(s) directly for their services, it must give the client(s) an itemized bill of all fees and expenses to be paid, with a written explanation of how and when such fees and expenses will be refunded if the service is not completed, and must make any refunds within sixty days of the completion of delivery of services.

6. *Comment:* Several commenters were concerned about the practices of some foreign providers who work with birth parents in the country of origin.

*Response:* Protecting the rights of birth parents to consent to an adoption is an important principle of the Convention. The primary responsibility for ensuring that consents have been obtained in compliance with the Convention is on the country of origin, however, not on the receiving country. The standards in § 96.46 require primary providers to supervise the actions of their foreign supervised providers, including by requiring the foreign supervised provider to adhere to the standard in § 96.36(a) prohibiting

child buying, or, if the consents were not obtained by a foreign supervised provider, by verifying that consents obtained by any other foreign non-governmental provider have been obtained in accordance with the Convention and applicable foreign law. We do not have authority, however, to regulate foreign providers directly, and there are limits to how much we can control the consent process abroad consistent with the framework of the Convention. We believe the approach taken in the regulations strikes the correct balance.

### Standards for Cases in Which a Child Is Immigrating to the United States (Incoming Cases)

#### Section 96.47—Preparation of Home Studies in Incoming Cases

1. *Comment:* One commenter requests that the regulations permit only accredited agencies or approved persons to conduct home studies.

*Response:* Section 201(b) of the IAA specifically allows non-accredited agencies and non-approved persons, known as exempted providers, to conduct home studies, as well as child background studies, in the United States, without being supervised. Exempted providers may prepare home studies and child background studies without being accredited, approved, or supervised as long as they are not currently providing, and have not previously provided, any non-exempt adoption services in the case. Home studies and child background studies conducted by exempted providers must be reviewed and approved by an accredited agency or temporarily accredited agency, however. Because the IAA provides clear guidance on this issue, and our regulations are consistent with the IAA, no change to the regulation is appropriate.

2. *Comment:* One commenter would like the regulations to eliminate the need for prospective adoptive parent(s) to disclose misdemeanors that are over ten years old and that do not involve abuse. Another commenter requests that the regulations state the length of time for which a home study will be valid as well as describe the renewal process for a home study. One commenter recommends that the regulations allow any home study preparer to prepare a second home study for the competent authority in the child's country of origin that is different from the home study sent to DHS. The commenter notes that certain disclosures, like medical conditions or disabilities, can put prospective adoptive parent(s) at risk of rejection in a particular country or

origin. A commenter believes that deliberate omissions of unfavorable information on a home study should be grounds for denial of accreditation or approval.

*Response:* Although we understand the concerns of the commenters regarding the content of home studies, we do not have the authority to make the suggested changes in these regulations. The Department has authority over the accreditation and approval of agencies and persons. DHS retains the authority to determine the content of a home study for Convention and non-Convention cases. We cannot remove requirements, such as the required disclosures of misdemeanors, from DHS regulations through these regulations.

These accreditation and approval regulations do not address the length of time that a home study is valid. The length of time that a home study remains valid is set by DHS. Therefore, we reference DHS' regulations, 8 CFR 204.3(e), which lay out the current requirements for a home study in intercountry adoptions. The home study requirements for intercountry adoptions can be found on the Web site of DHS's U.S. Citizen and Immigration Services, at <http://www.uscis.gov>.

As for the issue of preparing two home studies—one for the DHS process and one for the country of origin—under § 96.47(d) the preparation of two different home studies is not permitted. The United States will base its Convention Article 5(a) determination about the suitability of the prospective adoptive parent(s) in reliance on a home study. We believe it would be inappropriate for the United States to support a process whereby the receiving country would make that determination based upon one home study and then have the country of origin's decision based upon a different home study.

3. *Comment:* A commenter is concerned about the disclosure of criminal history information to individuals not currently authorized under State law to conduct criminal background checks for home studies. It requests clarification that only individuals authorized under State law can conduct criminal history background reviews.

*Response:* Sections 96.47(b) and 96.47(c)(1) require that home studies must be performed in accordance with 8 CFR 204.3(e) and applicable State law. Therefore, only individuals authorized under State law may conduct criminal history background reviews for a home study. See comment 9 on § 96.35, for further discussion of this issue.

4. *Comment:* One commenter believes that the Interstate Compact on the Placement of Children (ICPC) needs to be addressed in the regulations concerning home studies.

*Response:* We have chosen not to add compliance with the ICPC as a specific standard. To the extent ICPC requirements relevant to intercountry adoptions are incorporated into applicable State law, agencies and persons will be required to comply with them.

#### Section 96.48—Preparation and Training of Prospective Adoptive Parent(s) in Incoming Cases

1. *Comment:* One commenter states that the regulations should clarify that only agencies or persons—not prospective adoptive families—have the authority to decide whether prospective adoptive parent(s) should be available for the exemption from training outlined in § 96.48(g). Another commenter supports the ability of parents who have adopted before to “opt-out” of the training. Other commenters believe that families should not be exempted from all the training.

*Response:* We have changed the language of § 96.48(g) to clarify that it is the agency or person that determines whether prospective adoptive families can be exempted from the training. We expect agencies and persons to comply with § 96.48(g) and to evaluate prospective adoptive parent(s) to assess whether they have received adequate prior training or have prior experience as parent(s) of children adopted from abroad.

2. *Comment:* Many commenters express support for mandatory training for prospective adoptive parent(s), including the variety of training methods that are provided for by the regulations. One commenter recommends a minimum of twenty hours of pre-adoptive training for adoptive families. Other commenters believe pre-adoption training for prospective adoptive families should be voluntary. They are concerned about any additional costs or burdens to prospective adoptive parent(s). Some commenters recommend that training of prospective adoptive families should be interactive and not rely solely on videos, computers, or other distance learning methods. Another commenter suggests that the Department require prospective adoptive parent(s) to participate in “adoption playgroups,” so that prospective adoptive parent(s) and adoptive parents can educate each other and benefit from each other's experience. One commenter suggests that the regulations require agencies and

persons to conduct at least half of the training in person. Another commenter requests that the regulations require an independent licensed social worker to conduct the training.

*Response:* The IAA requires standards for an agency or person to provide a training program to prospective adoptive parent(s). We believe that Section 96.48(a)'s standard, that agencies and persons provide at least 10 hours of training to prospective adoptive parent(s), is appropriate and decline to change the hour requirement. Agencies and persons can exempt parents only as provided in § 96.48(g).

The standards in § 96.48(d) give agencies and persons latitude to design training sessions and materials based on the needs of the prospective adoptive family. We are not persuaded that we should restrict their flexibility in this regard or by requiring that only an independent licensed social worker be permitted to conduct the training. Finally, the IAA does not authorize the Department to require prospective adoptive parent(s) to participate in play groups, or other adoption support groups.

3. *Comment:* Several commenters remark that mandatory training places too heavy a financial and personnel burden on small agencies or persons. They suggest that the issues to be covered in the mandatory training be provided during the home study process. One commenter would like the agency or person who conducts the home study to determine how much additional training is necessary.

*Response:* Section 96.48(d)(5) specifically allows an extended home study process in cases where training cannot otherwise be provided. We decline to change the rules to make the home study preparer determine how many hours of additional training is necessary. Within the basic limits set in the regulations (ten hours), we want to give agencies and persons the discretion to make the necessary determinations about the training needs of prospective adoptive parent(s).

4. *Comment:* Commenters' suggestions for additions to the required adoptive families training curriculum include information about racial identity issues, general parenting skills, child development, the potential for children to have or develop mental illnesses, the risk that children may have a communicable disease, and legal recourse for parents after adoption. One commenter is concerned that the curriculum will "scare" families away from adoption. Two commenters believe that the curriculum needs to be tailored for each prospective adoptive family.

One commenter requests that the term "institutionalized children" be replaced.

*Response:* We agree that the training curriculum needs to be tailored according to the needs of the prospective adoptive family. The additional suggested topics are generally already encompassed by the broad list of topics that training should address in § 96.48(b). We have added some additional items that should be included in the training required under § 96.48(c), however, to ensure that the prospective adoptive parent(s) are as fully prepared as possible for the adoption of a particular child. Section 96.48(c)(3) now requires parents to be counseled on any "medical, social, background, birth history, educational data, developmental history, or any other data known about the particular child."

We believe the need to ensure that families be adequately prepared for an adoption outweighs any concern that the curriculum will discourage families from adopting. Finally, while the term "institutionalized children" may carry a negative connotation, it is used in this context to encompass the broad array of childcare centers, programs, and institutions, such as orphanages, that are typically used by countries of origin, not to suggest involuntary commitment to a mental health or other facility. We decline to change the term, because we believe it is appropriate in this context to ensure that training is inclusive of issues related to children in a wide variety of centers, programs, and institutions.

5. *Comment:* Several commenters suggest that agencies or persons should be required to provide post-adoption training and counseling.

*Response:* Section 203(b)(1)(A)(iii) of the IAA requires standards under which agencies and persons provide training programs to prospective adoptive parent(s) before the parents travel to adopt the child or before the child is placed with the parents. While we agree that post-adoption training and counseling may also be very helpful for some parents, post-adoption services are not services that are regulated under the IAA. Thus we are not making changes in response to these comments.

6. *Comment:* Two commenters would like the regulations to require agencies or persons to offer training to birth parents in countries of origin as well as to prospective adoptive families.

*Response:* Neither the IAA nor the Convention requires a receiving country to provide training to birth parents residing in a Convention country. Under Article 4(c)(1) of the Convention, the

country of origin is required to ensure that counseling is provided to the birth parents. When the child is emigrating from the United States, we require agencies and persons in § 96.53 to counsel birth parents about the effects of their consent to an adoption. We certainly encourage agencies and persons to undertake voluntarily the task of providing needed services to birth families in other countries of origin, if they are permitted to do so by the country of origin. We do not believe it would be appropriate to address such services in these regulations, however.

#### *Section 96.49—Provision of Medical and Social Information in Incoming Cases*

1. *Comment:* Many commenters maintain that the regulations require far more medical information to be provided than can be reasonably obtained. The commenters are concerned with overburdening and harassing foreign orphanages and doctors to the point where they will refuse to provide the medical information. They also worry that requesting too much information will cause delays in the adoption process. Commenters suggest that agencies and persons be required to use "reasonable efforts" to obtain medical information on a child. Many other commenters, however, request that the regulations force agencies and persons to provide comprehensive medical information. They maintain that access to accurate and comprehensive information about the child is essential for prospective adoptive parent(s). These commenters ask for stringent standards regarding medical and social information in incoming cases. Still other commenters believe that the regulations as written strike an appropriate balance between the two concerns.

*Response:* The Department has retained the basic structure of § 96.49, but made a number of changes to specific provisions in response to these comments. The Department recognizes that the provision of accurate medical records on the child is one of the most important issues facing prospective adoptive parent(s), adoptive parents, and adoptees, but an agency or person is generally dependent upon the country of origin to provide such information. It has tried to balance the need for detailed and accurate medical information about a particular child with the practical difficulties inherent in obtaining such information in many foreign countries. The Department has supplemented the IAA-mandated timeframes for the provision of medical records by adding to the standard in

§ 96.49(a) that such records be provided to prospective adoptive parent(s) as soon as possible. We have also revised and reorganized §§ 96.49(a) and (b) to clarify that those translations of medical records it is practicable to provide must be provided within the IAA-mandated timeframes.

The Department has maintained the requirements, in paragraphs (d) and (f), that agencies and persons use reasonable efforts to provide the required information. We have added, to § 96.49(d)(2), a provision that agencies and persons must try to obtain information on any special needs of the child. The Department has also added a standard to paragraph (g) calling for agencies and persons to continue to use reasonable efforts until the adoption is finalized to secure those medical or social records that could not be obtained previously.

Overall, the standard continues to reflect the Department's belief that it is critical that prospective adoptive parent(s) get as much medical information as possible, but also provides the flexibility necessary in light of the practical problems inherent in providing prospective adoptive parent(s) with medical records.

2. *Comment:* A commenter requests that the regulations more heavily emphasize providing birth family history. It requests that the following information on the child be included in the medical report: birth family biopsychosocial history, growth data, prenatal history, development status at the time of referral, specific information on known health risks where the child resides, any known siblings, and the whereabouts of siblings. Another commenter requests that agencies and persons be responsible for administering basic testing for communicable diseases. Two commenters request that agencies and persons be required to use standardized medical health and social history forms.

*Response:* The Department has amended several provisions of § 96.49 to require more specific information on the child's birth history, if available. In particular, § 96.49(f)(1) now specifically requires reasonable efforts to obtain available information about the child's birth and prenatal history. The Department has added a new standard, § 96.49(f)(3), that requires reasonable efforts to obtain available information about any birth siblings, including their whereabouts, whose existence is known to the agency or person or its supervised provider. The Department has also revised § 96.49(d)(3) to require reasonable efforts to obtain available growth data, including prenatal and

birth history, and developmental status over time and current developmental data at the time of the child's referral for adoption. Section 96.49(d)(4) continues to require reasonable efforts to obtain available specific information on the known health risks in the specific region or country where the child resides.

The regulations do not require agencies and persons to administer tests for communicable diseases. The Department believes that the correct role for agencies and persons, most of whom do not have staff with medical training, is to gather and forward as much medical and social information about the child as is reasonably possible, not to perform medical diagnostic tests themselves. Also, the Department is not requiring agencies and persons to use standardized health and social history forms. The governmental interest is in having agencies and persons get as much information about the child's medical and social history to the prospective adoptive parent(s) as possible, not in the format of the information.

3. *Comment:* Several commenters request that agencies and persons be granted the discretion to withdraw referrals of a child in less than a week if necessary in order to shorten the amount of time a child spends waiting to be adopted. They believe 48 to 72 hours is appropriate. Other commenters suggest a three-week review period, while others request establishing a two-week review period. In addition, several commenters request that the regulations be modified to more specifically lay out what "extenuating circumstances" would be appropriate exceptions to the one-week review period. Others request that the exception for "extenuating circumstances" be omitted.

*Response:* The Department has amended § 96.49(k) to require the accredited agency or approved person to give the prospective adoptive parent(s) at least two weeks, instead of one, to review the referral. In making this change, the Department is seeking to ensure that prospective adoptive parent(s) have enough time to make an informed, measured decision, using the specific medical and social history of the child they wish to adopt, that they are capable of properly caring for the child. We have retained the provision that permits the referral to be withdrawn earlier, however, to provide flexibility to agencies and persons in the rare cases in which there are extenuating circumstances involving the child's best interests.

4. *Comment:* A commenter requests the inclusion of language to allow for

adoptions of children who have not been pre-identified in advance of travel.

*Response:* The language of § 96.49(a) reflects section 203(b)(1)(A)(i) of the IAA, which requires medical records to be given to the prospective adoptive parent(s) no later than two weeks before the adoption or two weeks before the date on which the prospective adoptive parent(s) travel to the Convention country to complete all procedures relating to the adoption, whichever is earlier. We think this requirement is best read to apply only once a child has been identified and matched with the prospective adoptive parent(s). Prior to that time, there is no specific "adoption" contemplated, and any travel cannot be to complete all procedures relating to a particular adoption. We do not believe this standard was intended or must be read to preclude adoptions of children who have not been pre-identified prior to travel, and we do not believe it is necessary to change § 96.40(a) or to add a new standard to address this issue. If the prospective adoptive parent(s) have not been matched with a child before arriving in the country of origin, then compliance with the standard in § 96.49 will require that medical information on the child be provided to the prospective adoptive parent(s) either as soon as possible after the child is identified, but no later than two weeks before the adoption or placement for adoption, or—if a second trip is needed to complete procedures relating to the adoption—no later than two weeks prior to that travel, whichever is earlier.

5. *Comment:* One commenter requests that agencies and persons provide a copy of the child's medical records to the prospective adoptive parent(s) at least three weeks in advance if the record is not a correct and complete English translation. Several commenters request that an untranslated copy of the prospective adoptive child's medical records be provided to the adoptive family in addition to the English versions.

*Response:* The Department has amended § 96.49(c) to require agencies or persons to provide any untranslated medical reports or videotapes or other reports to prospective adoptive parent(s). It continues to require accredited agencies and approved persons to provide an opportunity for the clients to arrange for their own translation of the records, including a translation into a language other than English, if needed.

6. *Comment:* Several commenters request that any information obtained on the prospective adoptive child be obtained in accordance with the

Convention country's laws and procedures.

*Response:* In Convention adoptions, the laws of both countries involved must be followed. These regulations will not supersede any applicable domestic laws of a Convention country on the collection of information about a prospective adoptive child, as § 96.49(i) relating to videotapes and photographs of the child reiterates. We believe this is sufficiently clear from the standards in their entirety that no specific change is required in response to these comments.

7. *Comment:* A commenter believes that it is unnecessary to require a non-medical individual to document his or her training and to indicate whether or not he or she relied on objective data or subjective perceptions in making a medical assessment.

*Response:* The Department believes that it will help the prospective adoptive parent(s) better understand the information they are given about a prospective adoptive child if they know both the training and background of any person who contributed observations on the child, as well as the basis of his or her conclusions about the child. Thus, the Department is not deleting § 96.49(e)(3). The Department has, however, revised the standard to require that non-medical individuals provide only information on what data and perceptions were used to draw conclusions. The Department agrees that requiring an additional level of specification as to whether the individual relied on objective data or subjective perceptions in making the assessment is unnecessary.

8. *Comment:* Several commenters request that the standard in § 96.49(e), which sets out specific requirements for medical information provided by the agency or person, apply only if the agency or person provides medical information that is not the medical information provided by the Convention country to the agency or person.

*Response:* The Department has revised the standard at § 96.49(e) so that it applies only when the agency or person is providing medical information other than the information provided by public foreign authorities. We recognize that the agency or person may not be able to insist that the public foreign authority include specific information. In addition, the Department has added a provision to specify that, when the agency or person is providing medical information covered under the standard, it must make "reasonable efforts" to provide the specific information required under § 96.49.

9. *Comment:* Several commenters believe Central Authorities, rather than the accredited agencies or approved persons, should be responsible for providing accurate medical information.

*Response:* Under Article 16 of the Convention, the Central Authority of the country of origin, or other entities authorized to perform certain of its duties, must prepare a report on the child. This report must include information about the child's identity, adoptability, background, social environment, family history, and medical history (including that of the child's family), and any special needs of the child. The general medical history is just one component of the report. The IAA, on the other hand, requires the Department to impose very specific requirements regarding obtaining medical records on U.S. accredited agencies and approved persons. The primary purpose of § 96.49 is to implement the IAA requirements that agencies and persons obtain medical records and transmit them to the prospective adoptive parent(s).

10. *Comment:* Several commenters request that videotapes be required only when it is possible to obtain them from the child's country of origin. Two commenters believe videotapes of the child should be translated.

*Response:* The Department made a series of changes to § 96.49 to clarify the requirements related to videotapes of the child. Section 96.49(k) has been modified to clarify that prospective adoptive parent(s) must be allowed to obtain physician review of videotapes only if such tapes are available; this provision has not been specifically limited to videotapes obtained from the child's country of origin because the relevant question is whether a videotape is available, not where it is available from. The Department has also revised § 96.49(i) so that it explicitly states that an agency or person must ensure that videotapes and photographs of the child comply with the laws of the country where taken or recorded. In addition, § 96.49(c) now requires that an agency or person must provide the prospective adoptive parent(s) with any untranslated videotapes and an opportunity to translate any videotape that is provided.

11. *Comment:* Some commenters believe that a detailed summary of medical records should normally be sufficient because original medical records are typically voluminous. Such commenters also request that if the prospective adoptive parent(s) have been given only a summary of the medical records, if the summary was produced by anyone other than the

orphanage director, physician, or a person designated by the Central Authority of the country of origin, they should also be provided with the original medical records. Other commenters request that § 96.49(a) and (b) be replaced with language that more closely tracks the IAA requirement for a standard that an agency or person provide a copy of the medical records of the child (which, to the fullest extent practicable, shall include an English language translation of such records) on a date which is not later than the earlier of the date that is two weeks before: (I) the adoption; or (II) the date on which the prospective adoptive parent(s) travel to a foreign country to complete all procedures in such country relating to the adoption. Of particular concern was the fact that the proposed regulation did not appear to set a timeframe for the production of an English translation of the medical records.

*Response:* The Department recognizes that some medical records may, inherently, summarize or collect information based on other medical records, but it does not believe that the type of "summary" of original medical records that the commenters propose would suffice to meet the IAA requirement that a copy of the child's medical records be provided. While an agency or person would not be precluded from producing a summary of medical records on a voluntary basis for its clients, any such summary alone would not meet the standard in § 96.49(a), which requires production of a copy of the medical records.

The Department has revised and restructured §§ 96.49(a) and (b) to respond to the concern that the proposed rule did not set a time frame for the production of translations. Section 96.49(a) now clearly states that the medical records, including, to the fullest extent practicable, a correct and complete English-language translation of such records, must be produced within the time frames established by the IAA.

Section 96.49(b) now clearly states that where any medical record provided is a summary or compilation of other medical records, the agency or person is also required to provide the underlying medical records, if available.

12. *Comment:* Two commenters request that the phrase "all available medical records" be substituted for the phrase "the medical records" in § 96.49(a) and (b).

*Response:* The Department believes that this change is unnecessary, because § 96.49 clearly establishes that the obligation is to provide the medical records (including any available

underlying medical records related to a medical record that summarizes or compiles information), and to make reasonable and ongoing efforts to obtain a wide range of additional medical information. Section 96.49(j) also sets a standard prohibiting withholding, or misrepresenting, any available medical information concerning the child.

13. *Comment:* A commenter requests clarification that any State standards requiring a more timely and/or comprehensive disclosure of medical history would continue to apply to agencies and/or persons licensed in that State.

*Response:* This regulation is not intended to preempt any applicable State standards that require more timely and/or comprehensive disclosure of medical history.

14. *Comment:* One commenter believes that a U.S.-based physician should be required to evaluate medical information. The commenter also requests that the regulations require agencies and persons to provide a list of capable U.S. physicians who specialize in interpreting medical information from applicable countries of origin.

*Response:* Mandating that agencies and persons retain U.S. doctors directly to review all medical records would be a major change in the current practice of intercountry adoptions. Typically, it is the prospective adoptive parent(s) who select and retain a U.S. physician to complete a review and assessment of all available information on the child. We see no reason to change this practice. The regulations requiring advance disclosure of a child's medical information to prospective adoptive parent(s) are designed, at least in part, to ensure that prospective adoptive parent(s) have enough time to have the child's records reviewed by a U.S. physician, if they choose to do so, before they agree to adopt a particular child. While it may be helpful for agencies and persons to provide lists of U.S. physicians who specialize in intercountry adoptions who may be able to interpret foreign medical records, we do not think it is necessary to proper implementation of the Convention or IAA.

#### *Section 96.50—Placement and Post-Placement Monitoring Until Final Adoption in Incoming Cases*

1. *Comment:* Two commenters maintain that sending a guardian to bring a child from the country of origin should be an equally acceptable alternative to prospective adoptive parent(s) traveling to the country of origin to receive a child. They request that the words "and, if possible, in the

company of the prospective adoptive parent(s)" be deleted from §§ 96.50(a) and 96.51(a), so as to avoid the implication that use of a guardian is a less desirable approach.

*Response:* Sections 96.50(a) and 96.51(a) mirror Article 19 of the Convention, which states that Central Authorities shall ensure the "transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parent(s)." The phrase, "if possible" provides a degree of flexibility in cases in which travel with a properly trained escort offers an appropriate, secure alternative for transferring a particular child from the child's country of origin when adoptive or prospective adoptive parent(s) are unavailable.

2. *Comment:* A commenter requests that the regulations specify who will assume the costs of returning the child to the country of origin in the case of disruption when such return is determined to be in the child's best interests. The commenter also suggests that for adoptions that are not finalized within a set period of time, there should be a requirement for a decision to be made whether it is in the best interests of the child to remain in a guardianship arrangement in the United States or return to the country of origin. Another commenter believes that, even if an adoption is disrupted, the child should never be returned to his or her country of origin.

*Response:* The Department believes that the standards in § 96.50 adequately address the responsibility for costs of returning a child to the country of origin, in the case of a disruption. Section 96.50(f)(1) requires that the agency or person include in its adoption services contract with the prospective adoptive parent(s) a plan addressing who will have legal and financial responsibility for transferring custody in an emergency or in the case of impending disruption, and for care of the child. The contract between the agency or person and the prospective adoptive parent(s) should address who will assume the costs of returning the child to his or her country of origin and who will assume the costs of the child's care until the return is completed. Section § 96.50(f)(2) also requires that the plan address the circumstances in which the child will be returned to the child's country of origin, as a last resort, if that is determined to be in the child's best interests. The Department believes that these provisions are adequate to cover the rare case in which there is a disruption and it is determined to be in the child's best interests to return to the country of origin.

These regulations are not intended to change currently applicable laws, under which a State court determines whether a placement is in the best interests of a child before his or her adoption is finalized in the U.S. State court. In the event that the initial placement is found not to be in the best interests of the child, or is otherwise disrupted, § 96.50(d) and (e) of the regulation establish that the agency or person is responsible for finding an alternate placement for the child.

The Department has not changed the rule to prohibit the return of a child to his or her country of origin in the case of a disruption, because there may be instances in which such return is in the child's best interests. Section 96.50(e)(2) makes clear that an agency or person must obtain the agreement, in writing, of the Central Authority of the country of origin and of the Department to any such return.

3. *Comment:* A commenter requests that the Department track adoptions that are to be finalized in the United States.

*Response:* The tracking of intercountry adoptions is not within the scope of these regulations on accreditation/approval. Section 102(e) of the IAA requires the Department and DHS to jointly establish a Case Registry of all adoptions involving immigration of children into the United States regardless of whether an adoption occurs under the Convention. In addition, section 104 of the IAA requires the Department to submit an annual report to Congress that will provide information concerning intercountry adoptions involving immigration to the United States, including information on adoptions that are finalized in a U.S. State court. The reporting requirements set forth in § 96.43 will assist the Department in obtaining this information and fulfilling its reporting obligations.

4. *Comment:* Several commenters emphasize the importance of post-placement monitoring. They express support for this section of the proposed regulations. One commenter would like the regulations to provide minimum uniform standards for post-placement monitoring.

*Response:* While the Department also recognizes the importance of post-placement monitoring, the standards provided in § 96.50 are straightforward and we do not believe additional changes to the regulations, to require additional uniformity in how post-placement monitoring is conducted, are required.

5. *Comment:* Several commenters are concerned that adoptive parent(s) will not comply with the post-placement

monitoring (as opposed to post-adoption monitoring) requirements. For the protection of agencies and persons, they would like the regulations to provide a means for securing parental compliance with post-placement supervision. One commenter requests that the regulations require agencies and persons to notify prospective adoptive families of the frequency and total number of post-placement reports.

*Response:* These regulations include standards on post-placement monitoring because post-placement monitoring is an adoption service under the Convention and the IAA. Their focus is necessarily on adoption service providers, however, not on prospective adoptive parent(s), who the Department recognizes may choose not to cooperate with an agency or person providing post-placement monitoring. While these regulations do not regulate prospective adoptive parent(s) directly, the agency or person may take into account the prospective adoptive parent(s)' lack of post-placement cooperation in determining whether it is appropriate to proceed to adoption.

Please note that § 96.50(g) only requires that the agency or person provide post-placement reports to the Convention country if they are required by the Convention country, and then only until the adoption of the child is final. Section § 96.50(g)(1) of the regulations has been revised to require that prospective adoptive parent(s) be informed about the required post-placement reports in the written adoption services contract prior to the referral of the child for adoption. The Department expects such notice would include the frequency and number of post-placement reports. We are hopeful that this written notice will encourage prospective adoptive parent(s) to cooperate with the agencies or persons, because all parties will want to ensure that the adoption is finalized successfully.

#### *Section 96.51—Post-Adoption Services in Incoming Cases*

1. *Comment:* Several commenters are concerned that parents will not comply with any post-adoption reporting requirements imposed by countries of origin. Other commenters recommend that agencies and persons be required to provide post-adoption reports. Still other commenters recommend that agencies and persons provide post-adoption services when the family requests such services. They suggest that providing post-adoption services should not be voluntary.

*Response:* The Department recognizes that the potential for parents not

cooperating with post-adoption reporting requirements is at least as great as the potential for non-cooperation with regard to post-placement reporting. This issue is not appropriately addressed by holding agencies and persons responsible in the accreditation/approval context for failing to produce post-adoption reports, however, particularly because post-adoption reporting and other services provided after the child's adoption are not included in the IAA's list of adoption services that must even be provided by an accredited agency or approved person, and because we are not regulating adoptive parents in these regulations. While § 96.51(e) of the proposed rule would have regulated agencies and persons who voluntarily provided post-adoption services, the Department has decided to delete the standard to be consistent with the general approach taken in the IAA and these regulations, of not regulating any post-adoption services.

We understand that countries of origin that require post-adoption reports may stop working with U.S. agencies or persons or close adoption programs to U.S. prospective adoptive parent(s) if they cannot obtain the post-adoption reports. We anticipate that this issue will be addressed, however, by all providers and parents working cooperatively together in the understanding that doing so benefits all concerned, including persons who hope to adopt in the future.

2. *Comment:* A commenter recommends that § 96.51(a) be deleted because it is redundant with § 96.50(a). The commenter also recommends that § 96.51(c) and § 96.50(c) be switched.

*Response:* Post-placement monitoring is the subject of § 96.50, whereas § 96.51 deals with post-adoption services. Thus it is not appropriate to switch §§ 96.51(c) and 96.50(c), or to delete § 96.51(a). For an explanation of the differences between post-placement monitoring and post-adoption services, please see the response to comments on § 96.2 in subpart A.

3. *Comment:* A commenter believes the Central Authority in the country of origin should be notified if an adopted child is re-placed with another family in the United States after a disruption.

*Response:* Section 96.50(f)(4) requires agencies and persons to include in their written adoption services contract with the prospective adoptive parent(s) a plan describing, among other things, how the Central Authority of the child's country of origin and the Department will be notified if there is a disruption in the United States before final adoption.

4. *Comment:* A commenter requests that the regulations require agencies and persons to be responsible for placement of a child within an identified time frame after a dissolution takes place.

*Response:* The Department is not changing the rule to mandate that agencies or persons take actions after a dissolution takes place. Adoption services provided after dissolution are post-adoption services, which are outside the scope of these regulations. While both the IAA and the Convention contain provisions dealing with disruptions, which occur before an adoption is finalized, neither mandates any behavior with respect to dissolutions (other than reporting, whenever possible). The Department has tried to be consistent in not regulating post-adoption services in these regulations on accreditation/approval. Therefore, § 96.51(b) requires only that the agency's or person's adoption services contracts with prospective adoptive parent(s) inform the parents whether services will be provided if the adoption is dissolved and, if so, include a plan describing the responsibilities of the agency or person upon a dissolution.

We recognize that this may be unsatisfactory for State child welfare authorities faced with finding placements for children from dissolved intercountry adoptions. This rule is not intended to change any applicable State child welfare or protection law, however, or any applicable State law on the financial responsibility of parents for the post-dissolution care of the child. We note also that section 205 of the IAA amended section 422(b) of the Social Security Act, 42 U.S.C. 622(b) to require States to collect and report information on children who enter into State custody because of the disruption of a placement for intercountry adoption or the dissolution of an intercountry adoption. Thus, it should be possible in the long run to monitor disruptions and dissolutions and to evaluate any problems they are creating.

#### *Section 96.52—Performance of Hague Convention Communication and Coordination Functions in Incoming Cases*

1. *Comment:* A commenter believes that it is unreasonable for an agency or person to keep the Central Authority of the Convention country and the Department continuously informed about the adoption process.

*Response:* The Department has amended §§ 96.52(a) and 96.55(a) to clarify that an agency or person must keep the Central Authority of the Convention country and the Department



informed about the adoption process only as necessary. So, for example, if regulations outside this Part, such as visa regulations, require an agency or person to provide information to the Department about the completion of a particular step in the adoption process, this standard ties the agency's or person's accreditation status to compliance with the other regulation. We believe this clarification will reduce any undue burden on agencies or persons.

2. *Comment:* A commenter suggests that § 96.52(e) be deleted because it is too vague and presents a federalism issue. Section 96.52(e) requires the agency or person to take appropriate measures to perform any tasks in a Convention adoption case that the Department identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

*Response:* We have not deleted this provision because we want to ensure that the Department can rely upon the accredited agencies and approved persons to perform those tasks entrusted to them under the IAA's scheme for governing Convention adoptions involving the United States. Accredited agencies and approved persons will be notified of a case-specific task the Department identifies as necessary. We do not feel this section presents a federalism issue because the IAA gives the Department broad authority over Convention implementation, including the coordination of activities under the Convention by persons subject to the jurisdiction of the United States. Moreover, this rule does not direct state action. The States may continue to license agencies and persons to perform adoption-related services; where these regulations apply, they will be in addition to, not replacing, state regulation.

#### **Standards for Cases in Which a Child Is Emigrating From the United States (Outgoing Cases)**

##### *Section 96.53—Background Studies on the Child and Consents in Outgoing Cases*

1. *Comment:* Several commenters recommend that the regulations require additional information to be provided in the child's background study. Recommendations for such additions include: a psychosocial evaluation, non-identifying medical and genetic information, the name and contact information of the physician who performed the assessment, and non-identifying family history. Commenters recommend that prospective adoptive

parent(s) receive a copy of the medical records of the child prior to the adoption.

*Response:* The Department recognizes that providing substantial background information on a child can be helpful for both prospective adoptive parent(s) and children. With such information, prospective adoptive parent(s) may better understand the needs of the child, and a child will more likely be placed in a home where his or her needs would be met. We nevertheless have not expanded the standard in § 96.53(a). The standard is consistent with IAA which incorporates the requirements of Convention Article 16, which requires information on the child's identity, adoptability, background, social environment, family history, and medical history, including that of the child's family, and any special needs of the child. We do not believe it is appropriate to make this standard more burdensome, but we note that any State law requirements applicable to a child background study will continue to apply.

While we have not changed the substantive requirements of § 96.53(a), we have reorganized §§ 96.53(a) and (b) to present the requirements more clearly. For example, it should now be clear that an agency or person is always responsible for ensuring that the information listed in §§ 96.53(a)(1)–(3) is included in the child background study. We have also revised § 96.53(b) to clarify that a supervised provider may also prepare a child background study, so long as any applicable review and approval requirements are met.

Section 96.53(e) requires that the U.S. agency or person send the child background study to the Central Authority or other competent authority or accredited bodies of the receiving country. In response to the suggestion that the medical records of a child should be transmitted prior to the adoption, we have added to § 96.53(e) language that makes it clear that the agency or person should take all appropriate measures to transmit the child background study before the child's adoption. The regulations do not prohibit a U.S. accredited agency or approved person from also providing the child background study to the prospective adoptive parent(s) directly, if consistent with applicable State law and the law of the receiving country.

2. *Comment:* Several commenters would like the regulations to recommend a pre-placement visit between the child and the prospective adoptive parent(s), when the child is of appropriate age.

*Response:* Although we understand that a pre-placement meeting typically makes a child feel more comfortable about the transition to an adoption placement, the Convention and the IAA are silent on the subject of requiring a pre-placement visit, and the Department does not believe it is appropriate to impose such an additional requirement in these regulations on accreditation/approval. If applicable State law requires a pre-placement visit, then that requirement will apply to an intercountry adoption of a U.S. child emigrating to a Convention country.

3. *Comment:* Several commenters request that the minimum age for considering the child's wishes about the adoption be changed from ten to twelve years.

*Response:* The Department has changed § 96.53(d) in response to these comments, and in recognition of the fact that twelve is a widely accepted minimum age of consent as reflected in the Uniform Adoption Act, § 2–401(c). Section § 96.53 now provides that, unless State law provides a different age, if the child is twelve or older an agency or person must give due consideration to a child's wishes or opinions before determining that an intercountry adoption placement is in the child's best interest. While some State laws may be silent on this question, we believe that most States generally require a child's wishes must be considered at an age between 10 and 14 years.

4. *Comment:* A commenter recommends that the regulations require consent from both birth parents, not just the birth mother.

*Response:* The Department is not changing § 96.53(c) in response to these comments, because § 96.53 of the regulations reflects the language of Article 4 of the Convention on consents. The Department does not want to impose any requirements for consents in addition to those required specifically under the Convention and IAA. Section 96.53(c), consistent with Article 4, requires that the consent of any persons whose consent is necessary for the adoption has been obtained. Accordingly, in any case in which State law requires the consent of the birth father, in addition to that of the birth mother, § 96.53(c) would require that the consent of both birth parents be obtained.

5. *Comment:* One commenter would like the phrase "takes all appropriate measures to ensure" found in § 96.53(a) and § 96.53(c) changed to "ensures."

*Response:* We have kept "takes all appropriate measures to ensure" in the final rule, because primary providers

will be working with public domestic authorities or competent authorities who will be performing some of the tasks required under the Convention to complete a Convention adoption. The primary provider is not responsible for the quality of a public domestic authority's or competent authority's services when they complete Convention tasks, as reflected in § 96.14. Because these authorities are not accountable to the primary provider, it would be unfair to set a standard making the primary provider responsible for their actions. Agencies and persons are required, however, to take all appropriate measures to ensure that Convention tasks are conducted in accordance with the standards set forth in § 96.53.

6. *Comment:* Several commenters recommend that the regulations require that birth parents or other authorities whose consent is necessary to be counseled that their consent will result in the child living in a foreign country. They also recommend that the specific country of destination be named during the counseling.

*Response:* We agree that full disclosure of the effects of consent is important, but we are not amending § 96.53(c) in response to this comment. The purpose of § 96.53(c) is to incorporate the requirements on consents set forth in Article 4 of the Convention, not to impose any additional specific requirements on what information must be provided to persons or institutions whose consent must be obtained.

Article 4 of the Convention requires that the country of origin ensure that persons whose consent is required be counseled as may be necessary and informed of the effects of their consent, particularly with respect to whether an adoption will result in the termination of the legal relationship between the child and the birth family. The Convention language does not contain any additional specific requirements regarding the contents of the counseling, and the relevant IAA provision simply states that State courts with jurisdiction over a Convention adoption must be satisfied that the agency or person complied with Article 4.

Where applicable State laws establish more specific requirements about the contents of counseling, the agency or person will have to comply with these laws in addition to the IAA. Moreover, § 96.54(d) specifically provides that, if State law requires, agencies and persons must disclose to birth parents that the child will be adopted by parents who reside outside of the United States.

Because the Department does not intend to create Federal consent requirements beyond those required under the Convention and applicable State law, we have removed from § 96.53(c)(5) the specific requirement that a child be counseled and duly informed that his or her consent would result in the child living in another country.

#### *Section 96.54—Placement Standards in Outgoing Cases*

1. *Comment:* Numerous commenters would like the regulations to make it more difficult to place U.S. children abroad. Some commenters suggest that agencies and persons should be prohibited altogether from placing children who are born in the United States for intercountry adoption. Other commenters agree that U.S. children may be placed overseas, but think that the standard requiring reasonable efforts to find a timely adoptive placement for the child in the United States is too vague. Another commenter notes that not all children adopted from the United States will be infants, and asks whether children who are not newborns are required to be placed on a registry for a specific period of time. Other commenters request that the length of time of listing on an adoption exchange or registry be changed from thirty to sixty days.

*Response:* There is no basis in the Convention or the IAA for prohibiting U.S. children from participating in intercountry adoption. The Convention explicitly recognizes that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her country of origin. Article 4 of the Convention states that, after possibilities for placement within the country of origin have been given "due consideration," competent authorities may determine that intercountry adoption is in the child's best interests.

Accordingly, section 303(a)(1) of the IAA requires that an accredited agency or approved person ensure that, in a Convention adoption involving emigration from the United States, "it has made reasonable efforts to actively recruit and make a diligent search for prospective adoptive parent(s) to adopt the child in the United States," and that "despite such efforts, it has not been able to place the child for adoption in the United States in a timely manner." In furtherance of section 303(a)(1), § 96.54(a) provides guidance to agencies or persons on how to satisfy the "reasonable efforts" standard. Except in special circumstances, to demonstrate that the reasonable efforts standard has

been met, an agency or person is now required by §§ 96.54(a)(1) through (4) to: (1) disseminate information about the child and the child's availability for adoption through print, media, and internet resources designed to communicate with potential U.S. prospective adoptive parent(s); (2) list information about the child on a national or State adoption exchange or registry for at least sixty calendar days after the birth of the child; (3) respond to inquiries about adoption of the child; and (4) provide a copy of the child background study to potential U.S. prospective adoptive parent(s).

Note that, in response to several comments, the time period set out in § 96.54(a)(2) for listing a child on a national or State adoption exchange or registry has been increased from thirty days to sixty days after the birth of the child. We believe this additional time will help ensure that reasonable efforts are taken to place the child within the United States, without unduly delaying an intercountry adoption if one proves to be in the best interests of the child. This time period remains sufficiently short to avoid harming a child by keeping it on a registry for an excessive period of time (a concern expressed by some adoption experts who testified before Congress during consideration of the IAA).

Note also that the requirement to be registered for "at least sixty days after the birth of the child" applies both to newborn children and to older children. That is, every child must be listed for at least sixty days. The limitation of "after the birth of the child" is intended to preclude listing children before they are born.

2. *Comment:* Some commenters recommend that children emigrating from the United States be provided with assurances of citizenship in their adopted countries.

*Response:* The Department cannot control how Convention countries will apply their citizenship laws. Article 5 of the Convention provides, however, that a Convention adoption may proceed only after the competent authorities in the receiving country determine that the child is or will be authorized to enter and reside permanently there. Consistent with this requirement, § 96.55(d)(4) requires U.S. agencies or persons to transmit or provide to State courts evidence that the child will be authorized to enter and reside permanently (or on the same basis as that of the prospective adoptive parent(s)) in the receiving country.

3. *Comment:* Certain commenters believe that the regulations should mandate that receiving countries other

than the United States provide post-adoption services.

*Response:* Article 9 of the Convention requires each country to promote post-adoption services, but there is no requirement in the Convention that case-specific post-adoption services be provided in a receiving country. The availability of these services will be determined by the receiving country, its adoption service providers, and its law. The Department does not have the authority to impose such a requirement on Convention countries.

4. *Comment:* One commenter would like the regulations to address access to and retention of records in the receiving Convention country about U.S. children placed in that country.

*Response:* The Department has no authority to impose such a requirement on a receiving country. Access to and retention of records held in a Convention country will be governed by the laws of that country.

5. *Comment:* One commenter questions the authority of the Department to create or to impose on States any “preference” with regard to “best interests of the child” in the standards.

*Response:* The Department does not intend in this rule to create or impose new “preferences” that would influence States concerning the best interests of the child standard. Section 96.2, in defining “Best interests of the child” for the purposes of this part, specifically states that the term shall have the meaning given to it by the law of the State with jurisdiction to decide whether a particular adoption or adoption-related action is in the child’s best interests. In this context, the standards require that an agency or person must determine that a placement is in a child’s best interests, consistent with applicable State law on best interests of the child. Ultimately, it is up to the State court with jurisdiction to determine if the intercountry adoption meets all State law requirements and any applicable Convention and IAA requirements.

6. *Comment:* A commenter asks where the Department finds authority to mandate that the agency or person use “diligent efforts to place siblings together.”

*Response:* Consistent with our general approach of not creating new Federal requirements for Convention cases involving U.S. children where there is not specific language in the Convention or the IAA, and in response to this comment, we have modified the standard at § 96.54(c)(2) to require that agencies and persons make diligent

efforts to place siblings together “to the extent consistent with State law.”

7. *Comment:* Several commenters request that the U.S. accredited agency or approved person be informed if there is a disruption in an outgoing case. They also request that the standard address who will pay for the child’s transportation back to the United States if returning the child is determined to be in the child’s best interests.

*Response:* The Department expects that an agency or person will typically remain in contact with the relevant entities in the receiving country as a result of its compliance with the standards set forth in §§ 96.54(i)–(k), and therefore will likely be aware of any disruption. Article 21 of the Convention gives, however, the Central Authority of the receiving country the primary responsibility for determining when an adoptive placement is not in the best interests of the child. If the Central Authority of the receiving country or, where appropriate, another entity performing its duties, determines that continued placement of a child with the prospective adoptive parent(s) is not in the child’s best interests, it will have a number of responsibilities to protect the child. For example, the Central Authority, or other entity performing its duties, will have to arrange for the child to be removed from the prospective placement and will have to arrange temporary care; and, in consultation with the Central Authority of the country of origin (the Department) or, as appropriate, other entities performing U.S. Central Authority duties under the Convention, it will have to arrange for a new placement in the receiving country. If it cannot find an alternative placement, the Central Authority, or other entity performing its duties, as appropriate, must arrange for the return of the child to the United States. Section 96.54(k) requires that the agency or person consult with the Department before it arranges any return to the United States of any child who has emigrated in connection with a Convention adoption, and the Department anticipates that it will consult with the relevant agency or person, as appropriate, in any instance in which it learns of contemplated arrangements for return that do not already involve the agency or person.

Under the Convention, returning a child to the country of origin is a last resort. The child may still be a U.S. citizen and could be eligible for the Department to pay for his or her transportation expenses through the Department’s loan repatriation program (for more information go to <http://travel.state.gov/law/>

[overseascitizens.html](#)). Otherwise, the cost of returning the child to the United States may depend on what person or entity has legal custody or guardianship of the child.

8. *Comment:* Several commenters recommend that the home studies for prospective adoptive parent(s) of children emigrating from the United States include the same information that is required in § 96.47(a) of the regulations for home studies involving immigrating children.

*Response:* The Department is not making any change in response to these comments. The contents of a home study in an outgoing case under the Convention will be determined by the law of the receiving country and the law of the U.S. State where the adoption is proceeding.

9. *Comment:* Two commenters recommend that § 96.54(b) include language that specifies not merely that a timely placement was sought, but that a qualified adoptive placement was sought.

*Response:* The Department recognizes that locating a qualified placement is as important as finding a placement quickly. We have changed § 96.54(b) to state that efforts must be made to find a timely and qualified adoptive placement.

10. *Comment:* One commenter requests that a “relative” be defined. It believes that if “relative” is not spelled out clearly, the exception in § 96.54(a) from efforts to find a timely adoptive placement in the United States for adoptions by relatives will be subject to abuse.

*Response:* The State court that has jurisdiction over an intercountry adoption will look to its own State law to determine whether it is satisfied that reasonable efforts have been made to find a U.S. placement. Accordingly, we do not believe it is necessary to provide a definition of “relative” in these regulations in order to deter abuse of this exception.

11. *Comment:* Several commenters recommend the elimination of the exception to reasonable efforts provided in § 96.54(a), which allows birth parents to identify specific adoptive parents. Other commenters would like the birth parents to have more input on who adopts their child.

*Response:* We have not made changes in response to these comments, other than to clarify, in § 96.54(b), that the standard does not, in fact, provide an exception to the “reasonable efforts” rule; rather it provides exceptions to the prospective adoptive parent recruiting procedures set forth in § 96.54(a)(1)–(4), thereby recognizing that in some cases,

“reasonable efforts” can include no efforts at all, if no such efforts are in the child’s best interests. The regulations also permit a State court to accept or reject an accredited agency’s or approved person’s recommendation that it is not in the best interests of a particular child that the procedures set forth in § 96.54(a)(1)–(4) be followed. This approach is fully consistent with the Convention, which requires merely that “due consideration” be given to placing the child in the United States, as well as with the IAA.

On the question of birthparent preferences, the rule aims for consistency with current practices under State law, by allowing birth parents to select among prospective adoptive parent(s), so long as State law permits them to do so. Some birth parents may prefer that their child be placed with a relative in another country who has the capacity to provide suitable care for the child. Other birth parents may prefer a non-relative placement abroad. Nothing in the Convention or the IAA warrants taking a course different from applicable State law on the question of birthparent preferences.

12. *Comment:* One commenter seems to believe that the accreditation/approval standards may give the misleading impression that it will be an accredited agency or approved person who will decide the fate of outbound children when, in actuality, it will be done by State courts.

*Response:* It is correct that the State courts, not agencies or persons, will decide whether an outgoing adoption complies with applicable provisions of the Convention, the IAA, and State law, and thus may proceed. These standards apply to agencies and persons, however, and as such address Convention tasks that may be required of an agency or person. Such tasks may include gathering information and submitting it to the court in outgoing cases, in which case the agency or person must submit information to the State court that satisfies the Convention and IAA requirements.

*Section 96.55—Performance of Hague Convention Communication and Coordination Functions in Outgoing Cases*

*Comment:* A commenter requests clarification that nothing precludes access to adoption process information by a State licensing authority to the extent otherwise authorized by State law.

*Response:* The commenter is correct. Nothing in the Convention, the IAA, or this part is meant to preclude a State

licensing authority from obtaining information to the extent permitted or required under the State law of the licensing authority.

**Subpart G—Decisions on Applications for Accreditation or Approval**

Subpart G is organized in the same way as in the proposed rule, and includes § 96.57 (Scope); § 96.58 (Notification of accreditation and approval decisions); § 96.59 (Review of decisions to deny accreditation or approval); § 96.60 (Length of the accreditation or approval period); and § 96.61 (Reserved).

As discussed below, Section 96.60(b) has been modified to allow the accrediting entity more discretion.

*Section 96.59—Review of Decisions To Deny Accreditation or Approval*

*Comment:* Two commenters believe that the Department should revise § 96.59 to provide a right of administrative review of denied applications for accreditation or approval. One commenter states that such review is particularly necessary for the initial implementation period.

*Response:* The Department is not revising § 96.59 in response to these comments, because denial of accreditation or approval is not included as an adverse action under section 202(b)(3) of the IAA and is therefore not subject to a right of judicial review or administrative review. The Department notes, however, that § 96.59(b) permits the agency or person to petition the accrediting entity for reconsideration of the denial, pursuant to the accrediting entity’s internal review procedures. For further discussion of this issue, please refer to Section IV, C, paragraph 11 of the preamble for the proposed rule, published at 68 FR 54064, 54087.

*Section 96.60—Length of Accreditation or Approval Period*

1. *Comment:* Two commenters request that the regulations state that the fees for accreditation and approval will be adjusted to reflect whether an agency or person is accredited or approved for three or five years, instead of four.

*Response:* The Department agrees that the length of the accreditation or approval period is a factor that an accrediting entity may consider when setting its fees, but because the fee schedules are not included in these regulations the Department is not making any change in response to this suggestion. Please see the comments on § 96.8 for discussion of accrediting entity fees.

2. *Comment:* Two commenters support the ability of accrediting entities to vary the length of accreditation periods, and request that the Department allow agencies and persons to volunteer to become initially accredited or approved for other than four years. Alternatively, the commenters request that the Department require accrediting entities to choose which agencies or persons will be accredited or approved for other than four years by a random process.

*Response:* The criteria for choosing which agencies and persons will be accredited or approved for a period of other than four years will be established by the accrediting entities and approved by the Department. The Department believes that the accrediting entities will have the expertise to decide the appropriate criteria to make such determinations, and that the Department should not attempt to predetermine how such decisions are made. For example, it is unclear whether the wishes of the agency or person should be given weight, whether the process should be random, or whether the period should reflect the degree to which the agency or person demonstrates “substantial compliance.” Thus, we have not changed the regulation to include such criteria. In addition, the Department has modified § 96.60(b) to remove the requirement that accrediting entities consult with the Department before deciding the exact period for which a particular agency or person will be accredited or approved in the first accreditation or approval cycle. We believe that this approach will improve the efficiency of the accreditation process.

**Subpart H—Renewal of Accreditation or Approval**

Subpart H is organized in the same way as in the proposed rule, and includes § 96.62 (Scope); § 96.63 (Renewal of accreditation or approval); and § 96.64 (Reserved).

Section 96.63 has been revised in response to comments, discussed below, and § 96.63(a) has been revised to clarify that, while the accrediting entity will tell accredited agencies and approved persons it monitors of the date by which they should seek renewal, it is the accredited agency’s or approved person’s responsibility to seek renewal in a timely fashion.

*Section 96.63—Renewal of Accreditation or Approval*

1. *Comment:* A commenter requests that the Department add “probation” to § 96.63 as another status for an applicant. The commenter suggests that

this status could last for up to nine months after the expiration of an accreditation or approval period and provide accredited agencies or approved persons a period within which to correct any deficiencies in their compliance with the standards of subpart F.

*Response:* We have not added the status of “probation” to the rule because it is not a concept used in the IAA. We believe, however, that the rule already addresses the commenter’s concern, to the extent that § 96.63(c) provides that an accrediting entity may defer its renewal decision in order to give an accredited agency or approved person notice of any deficiencies and an opportunity to correct them before the accrediting entity decides whether to renew the accreditation or approval.

2. *Comment:* A commenter asserts that the focus of accrediting entities in renewal applications should be on an agency’s or person’s performance, rather than on merely reviewing documents.

*Response:* The Department has revised § 96.63(d) to incorporate specifically into renewal procedures the provisions of § 96.24, relating to procedures for evaluating applicants for accreditation or approval. Section 96.24 provides that accrediting entities may conduct interviews, as well as document reviews, during site visits. Thus, an accrediting entity’s renewal evaluation of an accredited agency or approved person, like its initial evaluation, may include both document review and interviews. See also the discussion of this issue in response to comments on § 96.27. The Department also notes that § 96.27(b) requires an accrediting entity to consider an accredited agency’s or approved person’s actual performance, for the purposes of renewal, in deciding whether the agency or person is in substantial compliance with the standards in subpart F.

### Subpart I—Routine Oversight by Accrediting Entities

Subpart I is organized in the same way as in the proposed rule, and includes § 96.65 (Scope); § 96.66 (Oversight of accredited agencies and approved persons by the accrediting entity); and § 96.67 (Reserved).

Section 96.66 has been revised in response to comment, as discussed below.

#### Section 96.66—Oversight of Accredited Agencies and Approved Persons by the Accrediting Entity

1. *Comment:* A commenter recommends that the Department clarify

the duties of accrediting entities to monitor accredited agencies or approved persons annually. Specifically, the commenter states that the Department should specify that accrediting entities will monitor substantial compliance based on a weighting and rating system.

*Response:* The Department believes that this is addressed in the rule, as § 96.66(a) provides that an accrediting entity must monitor accredited agencies and approved persons at least annually to ensure that they are in substantial compliance with the standards in subpart F, as determined using a method approved by the Department in accordance with § 96.27(d).

To further strengthen the accrediting entity’s oversight, however, the Department has added § 96.66(c), under which an accrediting entity must require accredited agencies and approved persons to attest annually that they have remained in substantial compliance and to provide supporting documentation to indicate ongoing compliance with the standards in subpart F. Any other additional specifications related to the annual monitoring duties of accrediting entities will be detailed in the agreement between the accrediting entity and the Department.

2. *Comment:* A commenter requests that the Department add to subpart I a system for oversight of accredited agencies and approved persons through a complaint system. The commenter also notes the importance of oversight through the investigation of complaints.

*Response:* Oversight through review of complaints is primarily addressed in subpart J of this rule. Section 96.66(a) provides that the accrediting entities must investigate complaints about accredited agencies and approved persons, as provided for in subpart J. Also, the accrediting entities are authorized by § 96.66(b) to conduct unannounced site visits at an accredited agency’s or approved person’s premises for the purposes of investigating a complaint against an accredited agency or approved person. Therefore, we did not make any additional modifications to subpart I.

3. *Comment:* A commenter states that the oversight provisions of the regulations should focus on checking the performance of agencies and persons through interviews with clients and personnel, rather than simply reviewing documents.

*Response:* This comment is very similar to the comment on § 96.63 with respect to procedures for renewals of accreditation and approval, and to comments on § 96.27. Section 96.27(b)

applies to accrediting entity oversight and requires an accrediting entity to consider an accredited agency’s or approved person’s actual performance, for the purposes of monitoring and enforcement, in deciding whether the accredited agency or approved person is in substantial compliance with these regulations. Therefore the Department does not believe it is necessary to revise the rule to respond to this concern.

4. *Comment:* One commenter suggests that each agency or person be required to provide a representative with whom the accrediting entity can have ongoing communications about compliance with accreditation standards.

*Response:* The Department agrees that it will be important for accrediting entities to have clear channels of communication with accredited agencies and approved persons, but does not believe this must be addressed in the rule. The Department intends to allow accrediting entities and accredited agencies and approved persons to set up day-to-day communication procedures that work for them.

5. *Comment:* A commenter states that accrediting entities should not conduct investigations. It believes that allowing them to perform investigations will result in a situation similar to the problems currently facing State licensing authorities, which it believes do not have sufficient legal authority or personnel to do appropriate investigations.

*Response:* The Department is taking no action in response to this comment. Section 202(b)(2) of the IAA clearly gives accrediting entities the responsibility for ongoing monitoring of accredited agencies and approved persons, including review of complaints, and the Department believes enough “checks” and funding are built into the accreditation system to ensure that accrediting entities will conduct properly any necessary and appropriate investigations of accredited agencies and approved persons. If the Department finds that an accrediting entity is failing to monitor adequately accredited agencies or approved persons, the Department may suspend or cancel the accrediting entity’s designation under § 96.10. Further, the Department, under § 204(b)(1) of the IAA, must take adverse action when an accrediting entity fails or refuses to act after consultation with the Department and the accredited agency or approved person is not in substantial compliance with the standards in subpart F. In this auxiliary role, the Department may undertake any necessary additional investigation to determine if adverse action is warranted. Finally, the

Department notes that issues involving violations of law will properly be referred by the accrediting entity to appropriate law enforcement entities.

### Subpart J—Oversight Through Review of Complaints

Subpart J is organized in the generally same way as in the proposed rule, although the titles and content of some of the provisions of the final rule have been revised to more accurately convey the allocation of responsibilities and procedures for complaint review. Subpart J includes § 96.68 (Scope); § 96.69 (Filing of complaints against accredited agencies and approved persons); § 96.70 (Operation of the Complaint Registry); § 96.71 (Review by the accrediting entity of complaints against accredited agencies and approved persons); § 96.72 (Referral of complaints to the Secretary and other authorities); and § 96.73 (Reserved).

Section 96.68 has been revised to explain the types of complaints that accrediting entities will process against accredited agencies and approved persons. Section 96.69 has been revised to simplify the description of the process for filing complaints against accredited agencies and approved persons, and to clarify what types of individuals may file complaints through the Complaint Registry or otherwise. Section 96.70, on the operation of the Complaint Registry, has been revised to better convey the functions that this system will be able to perform with respect to complaints. These and other changes are discussed below, and at section III, subsection C of the preamble, above.

#### Section 96.68—Scope

1. *Comment:* One commenter believes that the Department treats complaint review as a matter of private dispute resolution, when it should focus, instead, on the fundamental public interests involved. The commenter suggests that the Department add a new section to subpart J clarifying that the Department has a non-delegable responsibility to investigate issues of fundamental public interest related to intercountry adoptions.

*Response:* The IAA creates a regulatory scheme where accrediting entities have primary responsibility for monitoring the actions of accredited agencies and approved persons, while the Department is responsible for overseeing the accrediting entities. Although a Complaint Registry is not required by the IAA, the Department has provided for the Complaint Registry in a manner consistent with this overall

framework. Thus, these regulations provide for a complaint process that will ensure that most unresolved problems with accredited agencies or approved persons get reported to, and investigated by, the accrediting entities. If the accrediting entity fails to act, the Department will investigate, as appropriate, and determine if adverse action is warranted. The Complaint Registry will assist the Department in monitoring whether the accrediting entity is taking action as appropriate. The Department has added a provision at § 96.70(e) that makes clear that the Department retains authority to take any action the Department deems appropriate with respect to complaints.

#### Section 96.69—Filing of Complaints Against Accredited Agencies and Approved Persons

1. *Comment:* Two commenters suggest that complaints governed by this subpart should relate only to Convention adoptions and not to other adoption services provided by an agency or person.

*Response:* The Department agrees that the scope of this subpart should be so limited, and has modified § 96.68, the scope of subpart J, to clarify that the procedures described therein only apply to complaints that raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA.

2. *Comment:* Two commenters recommend that the Department narrow the types of complaints that can be filed with the Complaint Registry or with accrediting entities. In particular, one of the commenters asks that the regulations not permit a complaint to be filed with the Complaint Registry merely because it cannot be resolved with the agency, because this would transform an accrediting entity into an appeal board. The commenter recommends that a complainant be required to seek out alternative resolutions, including arbitration and appeals, before filing a complaint with the Complaint Registry.

*Response:* The complaint system established by these regulations will allow individuals to file complaints with the Complaint Registry if they are dissatisfied with the resolution of their complaints by the agency or person. This does not, however, preclude the agency or person from offering appeals or other dispute resolution procedures, and clients will be free to pursue such procedures before filing a complaint with the Complaint Registry if they wish. In addition, while resort to the Complaint Registry will require the accrediting entity to investigate the

complaint, this may allow accrediting entities to become aware of problems at an earlier stage than they would otherwise, in turn lessening the need for accrediting entities to take adverse actions, improving performance by accredited agencies and approved persons, and promoting greater compliance with the Convention, the IAA, and these regulations. Thus, we are not making the suggested changes.

3. *Comment:* Several commenters think that individuals who wish to file a complaint against an accredited agency or approved person should be able to make their complaint directly to the Complaint Registry without first having to attempt resolution with the agency or person itself. Commenters fear that an accredited agency or approved person might try to dissuade individuals from filing a complaint or take retaliatory actions against them if they complain. One commenter expresses concerns regarding how the prohibition on retaliatory action toward a prospective adoptive family will be monitored and over whether prospective adoptive parent(s) that file complaints will still be treated unfairly by an agency or person.

*Response:* The complaint procedures outlined in these regulations include several levels of review that should ensure that individuals who file complaints are treated fairly. If an agency or person takes any action to discourage a client or prospective client from making a complaint or retaliates against a client for making a complaint, the agency or person will not be in substantial compliance with § 96.41(e). The accrediting entities will monitor the compliance of accredited agencies and approved persons with this standard. The accrediting entities, therefore, will be a check against retaliatory action toward a complainant. The Department will act as another check against unfair treatment of complainants by an agency or person. At each level of review, an agency or person risks losing its accreditation or approval if it takes steps to retaliate against complainants. There are enough safeguards built into the complaint system that it is not necessary to change the requirement that complaints must first be filed with the agency or person.

4. *Comment:* Several commenters believe that § 96.41 of the proposed rule would limit use of the Complaint Registry to birth parents, adoptive parents, and adoptees, and recommend that the complaint process be expanded to allow other interested parties, such as health practitioners, social workers, mental health providers, and non-governmental organizations (NGOs), to

file a complaint directly with the Complaint Registry or the Department.

*Response:* Section 96.41 governs complaints to an agency or person, not complaints to the Complaint Registry. If any individual is not satisfied with the resolution of his or her complaint by an accredited agency's or approved person's internal complaint procedure, then he or she may file a complaint with the Complaint Registry. The Department has added a new § 96.69(c), however, to allow an individual who is not party to a specific Convention adoption case, but who nonetheless has information about an agency or person, to complain directly to the Complaint Registry.

5. *Comment:* One commenter is concerned that the complaint procedures of subpart J do not establish a workable system for the filing, investigation, and resolution of complaints against agencies and persons. The commenter suggests that the Department specify the process for the timely investigation and resolution of complaints and further requests that agencies and persons have the opportunity to present evidence and receive proper notice of pending complaints against them.

*Response:* Subpart J outlines the general process for making, investigating, and resolving complaints about accredited agencies and approved persons. Each accrediting entity will be responsible for establishing written procedures for recording, investigating, and acting upon complaints, that are consistent with this subpart. The accrediting entity's procedures must be approved by the Department. Accrediting entities will make information about their Department-approved complaint procedures available upon request, and the Department will post information about using the Complaint Registry on the Department's Web site.

6. *Comment:* A commenter suggests that the Department establish a neutral fact-finding tribunal to investigate and document alleged adoption abuses and to implement the Convention as a mechanism to resolve complaints and disputes between party countries.

*Response:* With regard to alleged adoption abuses by agencies and persons, the courts will serve as a "neutral tribunal" for determining whether adverse actions are appropriate. With regard to disputes with other countries, the Department, as Central Authority, will address them as appropriate; the mechanisms for resolving such issues through diplomacy are outside of the scope of these regulations. The Department will use information collected by the

Complaint Registry in the course of its ongoing diplomatic relations with Convention countries.

*Section 96.70—Review of Complaints About Accredited Agencies and Approved Persons by the Complaint Registry*

1. *Comment:* A commenter requests further clarification on the proposed Complaint Registry. The commenter believes that effective complaint mechanisms rely on clearly delineated serial escalation structures, where complainants, agencies/persons, or regulators may appeal to successively higher levels of administrative (and where applicable) judicial review. Other commenters support the complaint procedure as written.

*Response:* The Department agrees that effective complaint mechanisms require multiple levels of review. These regulations outline a process by which complainants involved in specific cases must file their complaints against an agency or person with that agency or person. If the complaint cannot be resolved through the agency's or person's internal complaint process, the complainant may file a complaint with the accrediting entity through the Complaint Registry pursuant to § 96.70. The Complaint Registry will make complaints available to the accrediting entity and to the Department. If an accrediting entity's investigation reveals that an agency or person is not in substantial compliance with these regulations, the accrediting entity can take an adverse action. The Department may suspend or cancel the accreditation or approval if it finds that an agency or person is substantially out of compliance with the standards in subpart F and that the accrediting entity has failed or refused, after consultation with the Department, to take action. We believe that these complaint procedures and enforcement steps provide enough levels of review to allow appropriate "escalation" and to enforce IAA compliance without being unduly cumbersome or too slow.

2. *Comment:* A commenter recommends that a complainant who is unsatisfied with the outcome of his or her complaint after a period of 30 days be permitted to file directly with the Complaint Registry. The commenter also recommends amending the provisions to allow a complainant to file with the Complaint Registry if a dispute has not been resolved within 60 days, or some other established time limit sufficient to weed out frivolous complaints and to address complaints that can be resolved amicably. Another commenter also stresses the importance

of timeliness in the complaint process. One commenter is concerned that the proposed grievance procedure will be "ineffectual, inadequate and self-interested," because the agencies and persons have no viable history of handling grievances in a timely and responsible manner.

*Response:* The Department has established complaint procedures and standards because of expressed concerns that some agencies and persons have not handled complaints effectively. Pursuant to § 96.41(c), all accredited agencies and approved persons must respond in writing to complaints within 30 days of receipt and must provide expedited review of complaints that are time-sensitive or that involve allegations of fraud. If the complaint cannot be resolved through the agency's or person's internal complaint process, then the complainant may file a complaint with the accrediting entity through the Complaint Registry. Also under § 96.69(b), if the complaint was resolved by an agreement to take action, but the primary provider, agency, or person failed to take the promised action within thirty days of agreeing to do so, the complaint may be filed with the accrediting entity through the Complaint Registry. Finally, § 96.71 also requires that the accrediting entity maintain procedures, including deadlines, for taking action upon complaints it receives from the Complaint Registry. This approach should be given a chance to work before further, more onerous, requirements are imposed on the assumption that agencies and persons will not resolve complaints efficiently and effectively.

3. *Comment:* A commenter requests that the Department adopt safeguards to screen out spurious or malicious complaints and to protect against manipulation of the complaint process.

*Response:* The Department believes that the constraints on filing complaints with accrediting entities will serve this safeguard function. In addition, once an accrediting entity receives a complaint from the Complaint Registry under § 96.70(b)(1), it will have authority to address spurious or other meritless complaints appropriately, and will share information publicly only about complaints against agencies or persons that have been substantiated, pursuant to § 96.92(a).

4. *Comment:* A commenter supports the creation of the Complaint Registry. It encourages the Department to consider following Norway's example by making the Complaint Registry an ombudsman service.

*Response:* The United States has followed a different model for implementation of the Convention, with the Department and accrediting entities having functions as provided in the IAA. The Complaint Registry is consistent with that structure.

5. *Comment:* One commenter thinks that the Complaint Registry should be easily accessible to potential complainants by telephone, postal mail, or electronic mail. Another commenter suggests the Complaint Registry should be available online.

*Response:* The Department agrees that it is important that the Complaint Registry be easily accessible to potential complainants as well as efficient, but also believes that the individuals making complaints must also be held initially responsible for making them in writing, not over the telephone. While the administrative details on how to access the Complaint Registry are not suitable for incorporation into these regulations, they will be posted on the Department's website, and the public will be able to access the Complaint Registry through multiple media.

6. *Comment:* Numerous commenters ask how the Complaint Registry will be set up. Others ask who will have ultimate oversight over the Complaint Registry. Other commenters want to know if the Complaint Registry will be established within the Department. Some commenters prefer that its precise functions be detailed in an agreement with the Department.

*Response:* The Department no longer contemplates that the Complaint Registry will be an independent entity with which the Department will have an agreement. Rather it will be a system established by the Department to assist the accrediting entities and the Department in their oversight functions. The relevant sections in subpart J, §§ 96.68–71, have been revised so that a party to an adoption case with a complaint against an agency or person may file it with the Complaint Registry after first seeking to resolve it with the agency or person. The Complaint Registry will receive and maintain information on complaints, and track the outcome of complaints. Addressing the complaints will be the responsibility of the accrediting entities and, in some circumstances, the Department. Every accredited agency or approved person will be required to give information to clients about their own complaint procedures as well as contact information for the Complaint Registry pursuant to § 96.41(a).

Subpart J describes the general duties and functions of the Complaint Registry. Once the Department has set up the

Complaint Registry, information about the functions and processes of the Complaint Registry, as well as contact information, will be posted on the Department's website.

7. *Comment:* A few commenters want the Complaint Registry housed with the Federal Trade Commission (FTC).

*Response:* The IAA gives the Department and its designated accrediting entities the responsibility for all accreditation and approval functions. The Complaint Registry is not provided for by the IAA, but is being provided for by the Department in its discretion to assist the accrediting entities and the Department in performing their oversight functions under the IAA. While section 102(c) of the IAA explicitly states that the Department's functions may not be delegated to any other Federal agency, the Department notes that nothing would preclude the FTC from undertaking an investigation of an adoption service provider if the FTC had jurisdiction to do so under its own authorizing legislation (e.g., for false advertising).

8. *Comment:* One commenter asks that the Department provide some method to ensure that agencies and persons keep records of complaints against them and provide factual information about those complaints to any individual who requests it.

*Response:* Pursuant to § 96.41, accredited agencies and approved persons are required to keep records of complaints against them, and to provide reports to the accrediting entity and the Department on the complaints they received and how they were resolved. In addition, § 96.92 requires accrediting entities to maintain written records documenting complaints against accredited agencies and approved persons, and steps taken to resolve complaints. If a member of the public inquires about complaints against a particular agency or person, the accrediting entity must provide information on substantiated complaints.

9. *Comment:* A commenter that is a State licensing authority suggests that referrals be made by the accrediting entity to the applicable State licensing authorities when complaints involve agencies or persons who are also subject to State monitoring. This would facilitate a close working relationship and coordination between the accrediting entities and State licensing authorities.

*Response:* The Department agrees that communication between accrediting entities and State licensing authorities is important. The Department has revised § 96.72(b) to require the accrediting

entity, after consultation with the Department, to refer to a State licensing authority or appropriate law enforcement authorities substantiated complaints that involve conduct in violation of Federal, State, or local law. The Department has also revised § 96.77(d) to require reporting to the appropriate State licensing authority of any adverse action that changes the accreditation or approval status of an agency or person. See also comment 1 on § 96.77.

10. *Comment:* One commenter states that the funding for the Complaint Registry should come from fees levied by the Department. Others want the Department to fund the Complaint Registry. Others want the provision permitting accrediting entities to collect and remit fees for the Complaint Registry deleted. Other commenters state that the fees for the Complaint Registry should not be levied collectively and that the cost of complaints should be borne exclusively by the agency or person in question. Commenters would prefer that information on fees be clear.

*Response:* The Department agrees that the Complaint Registry must be adequately funded. We therefore have retained the provisions that give us the discretion on how to fund the Complaint Registry. The Complaint Registry will assist both the Department and the accrediting entities, each of which has authority under the IAA to charge fees for its functions. How the Complaint Registry will actually be funded will depend on the overall costs of operating it, the availability of appropriated funds, and the proper allocation of costs between the Department and the accrediting entities.

11. *Comment:* One commenter recommends that every complaint be forwarded to a designated accrediting entity for review.

*Response:* The Complaint Registry will make complaints available to the accrediting entity and the Department. The Department anticipates that all properly filed complaints against accredited agencies and approved persons that raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA will be forwarded to the appropriate accrediting entity, with the possible exceptions of sensitive law enforcement matters and complaints raised by government officials or a foreign Central Authority directly with the Department pursuant to § 96.69(d). Even if an accrediting entity is not given a particular complaint to review directly, it will be informed of all such complaints that are filed against an



agency or person that it has accredited or approved. In addition, pursuant to § 96.41, accredited agencies and approved persons are required to provide the accrediting entity and the Department with reports on the complaints they received and how they were resolved.

12. *Comment:* A commenter recommends that the Department add criteria to the regulations specifying the process for submitting complaints against the Complaint Registry. It suggests that such complaints be handled in the same way complaints about accrediting entities will be handled.

*Response:* The public may alert the Department, Bureau of Consular Affairs, of any dissatisfaction it has with the operation of the Complaint Registry. Because the Department no longer contemplates that the Complaint Registry will be an independent entity, but rather that it will be a system established by the Department to assist the Department and the accrediting entities, the Department does not anticipate that any procedures for filing complaints against the Complaint Registry will be necessary.

#### *Section 96.71—Review of Complaints Against Accredited Agencies and Approved Persons by the Accrediting Entity*

*Comment:* One commenter asks if the notifications of the outcome of complaint investigations made pursuant to § 96.71(c) (which in the proposed rule would have required notifications to the complainant, the Complaint Registry, and to any other entity that referred information), will be available to the public through a FOIA request. Commenter believes that such information will help the public protect itself and make informed decisions.

*Response:* The Department has ensured, in subpart M of these regulations, that the public may obtain information about the outcome of an accrediting entity's investigations into a complaint. Section 96.92(a) requires an accrediting entity to verify, upon inquiry from a member of the public, whether there have been any substantiated complaints against an accredited agency or approved person and, if so, to provide information about the status and nature of the substantiated complaint. Thus, members of the public may learn the outcome of an investigation that resulted in a substantiated complaint against an accredited agency or approved person. Section 96.91(b) also requires an accrediting entity to explain to the public the reasons for any withdrawal of

temporary accreditation, or suspension, cancellation, or refusal to renew accreditation or approval, or any debarment.

Section 96.71(d) of the final rule requires that the accrediting entity enter information on the outcome of complaint investigations into the Complaint Registry established by the Department. The FOIA and its exceptions, along with other applicable Federal law such as the Privacy Act, will apply to this information to the extent that it constitutes a Department record.

#### *Section 96.72—Referral of Complaints to the Secretary and Other Authorities*

1. *Comment:* One commenter thinks that the regulations limit reports to the Department by an accrediting entity to complaints that demonstrate a pattern of serious, willful, grossly negligent, or repeated failures to comply with the standards of subpart F. The commenter requests that an accrediting entity report every complaint to the Department and make the investigation public.

*Response:* The regulations do not limit the reporting requirements of an accrediting entity to the serious infractions listed in § 96.72. Pursuant to § 96.93(a)(4), accrediting entities must make semi-annual reports to the Department that summarize, among other things, all substantiated complaints against accredited agencies and approved persons and the impact of such complaints on their accreditation or approval status. As well, under § 96.71, the accrediting entity is required to enter information into the Complaint Registry about the outcomes of investigations and actions taken on complaints. This information then will be available to the Department.

As well, § 96.92 does require an accrediting entity to respond to public inquiries regarding substantiated complaints against accredited agencies or approved persons, disclosing the status and nature of the complaint. The public, therefore, has access to information about complaints against agencies and persons.

2. *Comment:* One commenter suggests that the regulations should require accrediting entities to have an investigator familiar with relevant laws, as well as Section 501(c) of the Tax Code, on retainer to investigate complaints.

*Response:* Pursuant to § 96.24(a), accrediting entities must use evaluators that have expertise in intercountry adoption, standards evaluation, or management or oversight of a child welfare organization. Evaluators with this type of expertise are presumed to

have familiarity with relevant laws. The Department does not think it necessary to specify in these regulations exactly what evaluators must know about relevant laws. The Department wants to leave flexibility in the regulations to allow accrediting entities to find and use the people they believe will be most qualified for the job of evaluating agencies and persons.

#### **Subpart K—Adverse Action by the Accrediting Entity**

Subpart K is organized in the same way as in the proposed rule, and includes § 96.74 (Scope); § 96.75 (Adverse action against accredited agencies or approved persons not in substantial compliance); § 96.76 (Procedures governing adverse action by the accrediting entity); § 96.77 (Responsibilities of the accredited agency, approved person, and accrediting entity following adverse action by the accrediting entity); § 96.78 (Accrediting entity procedures to terminate adverse action); § 96.79 (Administrative or judicial review of adverse action by the accrediting entity); and § 96.80 (Reserved).

The Department made a number of revisions to §§ 96.76—96.79 of this subpart, which are discussed below and at section II, subsection C of the preamble, above. Many of these revisions clarify the options that are available to an agency or person that is faced with an adverse action. A number of others relate to the transfer of Convention cases and adoption records.

#### *Section 96.75—Adverse Action Against Accredited Agencies or Approved Persons Not in Substantial Compliance*

1. *Comment:* A commenter requests that the Department specify whether imposing the adverse action of suspension means that an agency or person loses accreditation or approval and must transfer cases. If the purpose of suspension is to allow an entity a short period of time in which to take corrective action to comply with standards, the commenter recommends the category be renamed “probation, with required corrective action” and not include a requirement to transfer cases and records. Another commenter echoes the suggestion of a probationary period, recommending a one-time, three-month probationary period. The commenter also states that classifying corrective action as an adverse action, as § 96.75(b) does, is inconsistent with the typical use of the term “corrective action;” this commenter believes that requiring corrective action is typically a precursor to a decision to impose a penalty. These commenters also state that there is

insufficient due process for agencies or persons that are subject to adverse actions. Other commenters support the regulations as stated.

*Response:* The Department is not renaming, removing, or creating any category of adverse action in response to these comments, because section 202(b)(3) of the IAA specifies the types of adverse action an accrediting entity may take as including requiring corrective action; imposing sanctions; and refusing to renew, suspending or canceling accreditation or approval. The IAA does not specify “probation” as an adverse action. If an accrediting entity requires corrective action or imposes sanctions—two of the adverse actions specified by the IAA—and yet remains concerned about the agency’s or person’s compliance with the standards in subpart F, it may take one of the other types of adverse action provided for in the IAA—affecting the accreditation or approval status of the agency or person—and may require the agency or person to transfer any Convention cases or adoption records.

In response to the question on the effects of suspension, we note that, per § 96.77(b), “suspension” of accreditation or approval will require an agency or person to cease to provide adoption services in Convention adoption cases and consult with the accrediting entity to determine whether to transfer its Convention cases and adoption records. In the case of cancellation of accreditation or approval, however, Convention cases and adoption records must be transferred to other accredited agencies, approved persons, or State archives, according to the plans required by §§ 96.33(e) and 96.42(d).

In response to commenters’ concerns about the due process available to agencies or persons facing adverse actions, the Department notes that § 96.76(b) of the rule provides that, prior to taking adverse action, the accrediting entity may advise the agency or person of the deficiencies that may warrant an adverse action, provide an opportunity to take corrective action, and recognize demonstrated compliance as curing the deficiency. If the accrediting entity does not communicate with the agency or person prior to taking the adverse action, § 96.76(b) requires the accrediting entity subsequently to allow the agency or person to demonstrate that the adverse action was unwarranted. We note, too, that agencies and persons may seek judicial review in Federal court of adverse actions in accordance with the IAA. Section 96.79 incorporates the IAA’s provisions on judicial review. Please see the discussion on §§ 96.76

through 96.79 for a summary of comments on these sections, and the Department’s detailed responses related to options to protest adverse actions.

2. *Comment:* A commenter objects to accrediting entities imposing sanctions regarding specific cases or specific Convention countries as described in § 96.75(e). Other commenters submitted conflicting comments about whether accrediting entities should be allowed to determine whether an agency or person has substantially complied with standards for accreditation or approval. Other commenters state that the Department should develop the procedures used by accrediting entities to impose adverse actions. Several commenters state that § 96.76 does not properly reflect section 204 of the IAA, regarding the imposition of adverse actions, and suggest that the language of the IAA be incorporated into the regulations to establish the standards for the imposition of adverse actions.

*Response:* To enforce the accreditation and approval standards laid out in subpart F of these regulations, the IAA gives both accrediting entities and the Department the authority to impose adverse actions. Section 202(b) of the IAA gives an accrediting entity authority to take adverse action when an agency or person is not in substantial compliance with the applicable requirements, and gives accrediting entities substantial flexibility in determining which adverse action is appropriate. The Department believes § 96.75 accurately reflects this flexibility in the IAA.

We are not removing the regulatory provisions that permit accrediting entities to impose sanctions related to a particular case or for a specific Convention country. Accrediting entities will be in the best position to learn of problems in specific cases or Convention countries and to determine if corrective actions are needed and what adverse action is appropriate. The methods developed by the accrediting entities to assess substantial compliance, pursuant to § 96.27, may also aid the accrediting entities in determining which adverse actions are appropriate for particular situations.

Finally, we believe this provision is consistent with section 204(b) of the IAA, which only requires the Department to suspend or cancel accreditation or approval in instances in which it finds that an agency or person is substantially out of compliance with the standards in subpart F and that the accrediting entity has failed or refused, after consultation with the Department, to take appropriate enforcement action. The Department may also debar

agencies or persons in egregious circumstances, as specified in section 204(c). Subpart L of the rule contains a number of provisions incorporating IAA section 204’s guidelines for Departmental oversight of agencies and persons.

#### *Section 96.76—Procedures Governing Adverse Action by the Accrediting Entity*

*Comment:* Several commenters recommend that the regulations clearly state that accrediting entities should be allowed to take adverse action without notice only in the case of “clear and convincing evidence of an imminent danger to a child.” Other commenters assert that if an adverse action is taken without notice, the accrediting entity must allow the accredited agency or approved person an opportunity after the notice is issued to provide information refuting that the adverse action was warranted.

*Response:* We have changed § 96.76 to address the commenters’ concerns about providing notice to agencies and persons and to ensure that it is consistent with the IAA. Section 96.76(b) now provides that, before taking an adverse action, the accrediting entity may advise the agency or person of the deficiencies that may warrant adverse action; provide an opportunity for the agency or person to take corrective action; and recognize demonstrated compliance. This section also provides that, if the accrediting entity takes the adverse action without first providing notice, the accrediting entity must subsequently provide notice and an opportunity for the agency or person to refute that the adverse action was warranted. Thus the affected agency or person is always given an opportunity to be heard, either before or after adverse action is taken, and the accrediting entity is given the flexibility to act immediately if the circumstances so warrant. The Department thinks it important to leave the accrediting entities the discretion to balance the interests and risks at stake for each factual scenario, in determining at what point to allow the affected agency or person an opportunity to be heard. We have removed from the rule the example given in the parenthetical, to avoid any suggestion that the example is the sole circumstance in which prior notice would not be required.

*Section 96.77—Responsibilities of the Accredited Agency, Approved Person, and Accrediting Entity Following Adverse Action by the Accrediting Entity*

1. *Comment:* One commenter recommends that an accrediting entity be required to notify the applicable State approval or licensing authority of an adverse action against an accredited agency or approved person, to enhance coordination between accrediting entities and State licensing authorities.

*Response:* The Department agrees that, in order to comply with these regulations, accrediting entities will have to communicate well with State licensing authorities. Therefore, the Department is adding to § 96.77(d) the requirement that accrediting entities report to the appropriate State licensing authority, in addition to the Department (as was required by the proposed rule), any adverse actions they take that changes the accreditation or approval status of an agency or person. This notification requirement will be addressed more fully in the accrediting entity's agreement with the Department.

2. *Comment:* Several commenters recommend that the Department clarify the guidelines for the transfer of Convention cases due to suspension or cancellation of accreditation or approval. Many commenters ask whether prospective adoptive parent(s) will have a role in the decision to transfer their case. Another commenter thinks that accrediting entities should not play any role in determining whether and how to transfer pending cases or records, suggesting that it would not be appropriate for the accrediting entity to be involved in handling of individual cases or, given the financial benefit associated with the transfer, in selecting the agency or person to receive transferred cases.

*Response:* The Department is not eliminating the requirement that after cancellation and, in some instances after suspension, an agency or person must transfer its Convention cases under the oversight of the accrediting entity. Under §§ 96.33(e) and 96.42(d), the agency or person must have plans for transferring Convention cases and adoption records if it ceases to be able to provide adoption services. In the case of cancellation, the final rule requires agencies and persons to execute these plans. In the case of suspension, the agency or person must consult with the accrediting entity about whether to do so. Agencies and persons will have the main responsibility for working with families when transferring their Convention cases after suspension or

cancellation but they will have to keep the accrediting entity informed about the process.

In the event that the agency or person is unable to transfer its Convention cases and/or adoption records consistent with these plans, the Department has amended §§ 96.77(b) and (c) to require the accrediting entity to inform the Department of the breakdown in the transfer plans, and to then assist the Department in coordinating efforts to help the agency or person with the transfer of pending Convention cases and adoption records. Such coordination will include efforts to identify other accredited agencies or approved persons to assume responsibility for the cases. This requirement ensures that the accrediting entity contributes its institutional knowledge about the agency or person, including knowledge related to the agency or person's transfer plan, to the process of transferring cases and records. This requirement also compels the accrediting entity to remain involved in overseeing case transfers that result from its adverse actions. It should not, however, put the accrediting entity in the position of independently assuming individual case transfer responsibilities and/or independently selecting alternate accredited agencies and/or approved persons to which cases will be transferred.

*Section 96.78—Accrediting Entity Procedures To Terminate Adverse Action*

*Comment:* Several commenters suggest that an agency, person, or other interested party should have the opportunity to challenge the accrediting entity's interpretation of a regulation or law. Further, some commenters express concern that the provision in § 96.67 that requires an agency or person to petition an accrediting entity to terminate an adverse action on the grounds that the deficiencies cited have been corrected before seeking judicial review in effect requires an agency or person to admit guilt. The commenters recommend that the Department establish an administrative mechanism through which an agency or person can challenge an adverse action it believes was unfounded or taken improperly.

*Response:* The Department notes that this rule provides several opportunities for agencies or persons to challenge the accrediting entity's interpretation of a regulation or law. Under § 96.76(b), as revised, an accrediting entity must allow an accredited agency or approved person the opportunity to submit information refuting that an adverse action would be or is warranted. The

accrediting entity may withdraw, or choose not to impose, an adverse action based on this information. The IAA also provides for Federal judicial review of an accrediting entity's adverse action.

In addition, the Department has revised § 96.78 to clarify the responsibilities of the accrediting entity to provide an opportunity to seek termination of an adverse action. Section 96.78(a) now states that an accrediting entity must maintain internal petition procedures, approved by the Department, to give agencies and persons an opportunity to challenge adverse actions on grounds that the deficiencies underlying the adverse action have been corrected. The accrediting entity must now inform the agency or person of these procedures at the same time that it informs them of the adverse action itself. To ensure consistency with the fact that the IAA provides no other right to review of adverse actions at the accrediting entity level, the provision now also makes explicit that the accrediting entity is not required to maintain any other procedures to terminate or review adverse actions, and may make such procedures available only with the consent of the Department.

In response to commenters' concerns that this section requires an agency or person to assume "guilt" before challenging an adverse action, the Department has added § 96.78(f) to clarify that nothing in this section would prevent an accrediting entity from withdrawing an adverse action if it concludes that such an action was based on a mistake of fact or other error. Thus, an agency or person that believes it has done nothing wrong may ask an accrediting entity to withdraw an adverse action as unfounded or based on a factual error. Since this is not a formal administrative remedy, but just an option for conducting business that remains available, this approach could be taken at any time. While the agency or person will have no formal "right" to review, good business practices will presumably result in the accrediting entity in some cases choosing to change its prior decision. Alternatively, the agency or person may choose to challenge the action in district court. In contrast, an agency or person who wishes to demonstrate that it has taken corrective action to remediate an admitted deficiency may petition the accrediting entity to terminate the adverse action under the procedures required under § 96.78(a).

Please also see the responses to comments on §§ 96.79 and 96.84, related to review of accrediting entity decisions.

*Section 96.79—Administrative or Judicial Review of Adverse Action by the Accrediting Entity*

1. *Comment:* Several commenters raise concerns over the limits of judicial and/or administrative review of adverse action. Many commenters request that the Department create guidelines for the imposition of adverse actions that would include notices, standards of proof, hearings, an internal review process, and an appeal process to ensure due process for accredited agencies or approved persons.

*Response:* Under § 96.78(a), accrediting entities are required to maintain internal procedures, approved by the Department, to allow agencies or persons to petition for termination of adverse actions on the grounds that the deficiencies necessitating the adverse action have been corrected. This process for petitioning to terminate an adverse action on these limited grounds is the only internal review procedure set out in the IAA. If, after exhausting its remedies through the internal petition process, where applicable, an agency or person wishes to appeal the final decision of the accrediting entity, it may do so in Federal court as provided under the IAA. We have modified § 96.79(a) to reflect these parameters in a way that is consistent with the IAA.

The Department has also revised § 96.79(b) to emphasize that the IAA's limitation on administrative review of adverse actions by an accrediting entity in section 202(c)(3) of the IAA necessarily applies to both nonprofit accrediting entities and public domestic authorities that are designated as accrediting entities.

2. *Comment:* Some commenters maintain that the scope of judicial review after a denial of accreditation or approval as set forth in § 96.79(b) is unreasonably narrow. One commenter suggests that, if an agency or person is denied accreditation or approval, the agency or person should be allowed to apply to another accrediting entity.

*Response:* The IAA provides for judicial review, in a United States district court, of adverse actions, including requiring corrective action, imposing sanctions, or suspension of, cancellation of, or refusal to renew accreditation or approval. As discussed in the response to the comment on § 96.59 in subpart G, denial of accreditation or approval is not included within the scope of such review.

The Department has not changed the regulation to permit agencies and persons to apply to a different accrediting entity after being denied

accreditation or approval. The Department does not want to encourage agencies and persons to “shop around” to different accrediting entities instead of bringing their services into compliance with these regulations. In addition, the Department wishes to avoid the drain on the limited resources of all accrediting entities that would result if a second accrediting entity would be required to go through the work of gathering documentation, doing site visits, and interviewing people in connection with an evaluation of an agency or person that another accrediting entity has already evaluated.

3. *Comment:* One commenter thinks that § 96.79(c), which requires an accredited agency or approved person to seek Federal judicial review of an adverse action through a Federal district court, will hinder it from taking on adoption cases with extenuating circumstances or special needs children.

*Response:* The provisions for judicial review in the IAA and § 96.79(c) are intended as a benefit, not a burden, to agencies and persons, to ensure that they are treated fairly when subjected to adverse actions. Sections 96.76 and 96.78 also now clearly provide opportunity for an agency or person to seek reversal of an adverse action without going to Federal court, which may address the commenter's apparent concern with the time and cost of Federal litigation. This provision should not in any way discourage agencies or persons from performing adoption services for special needs children in Convention countries.

4. *Comment:* One commenter requests that the Department explain the significance of IAA section 202(c)(3) of the IAA, which provides for judicial review of adverse actions in Federal courts under 5 U.S.C. 706 of the Administrative Procedure Act (APA), and treats an accrediting entity as an “agency” under 5 U.S.C. 701 for the purpose of this review. The commenter suggests that its ability and willingness to act as an accrediting entity will be seriously impacted by this provision, along with that of other private organizations and public authorities.

*Response:* The right provided in section 202(c)(3) of the IAA to challenge adverse actions in Federal courts is an express exception to section 504 of the IAA's mandate that the Convention and the IAA shall not be construed to create a private right of action, except where otherwise provided. Section 706 of the APA sets out the legal standards by which a Federal court may review decisions made by agencies, as defined in the APA, and the procedures which the agencies used to make those

decisions. The relief sought in an APA action is generally reversal or modification of an administrative action, and money damages are not available. The statement that, for the purposes of challenges to adverse actions, an accrediting entity will be considered a 5 U.S.C. 701 agency, brings all accrediting entities (private nonprofit or public) into the scope of “agencies” against whom APA actions may be brought. Thus, for example, 5 U.S.C. 706(2)(A) would allow a Federal court to set aside an adverse action that had been taken “in excess” of an accrediting entity's authority under the IAA.

5. *Comment:* Two commenters recommend that the Department include a provision for alternative dispute resolution, given the potential financial burden of Federal court litigation. According to one of the commenters, this could be accomplished by allowing accrediting entities to utilize dispute resolution clauses in their contracts with agencies or persons seeking accreditation or approval.

*Response:* Section 202(c)(3) of the IAA expressly authorizes Federal judicial review of certain enumerated adverse actions taken by an accrediting entity, and section 202(c)(2) expressly prohibits administrative review of an adverse action by an accrediting entity (except to the extent review is provided under section 202(c)(1) to determine if deficiencies have been corrected). The IAA is silent on whether accrediting entities and agencies and persons may agree to alternative dispute resolution procedures. We are not including in the regulations a provision that permits designated accrediting entities to mandate that agencies or persons agree to binding arbitration, or agree to use other alternative dispute resolution mechanisms; such an approach could lead to agencies or persons feeling coerced. By the same token, we are not ruling out the option that accrediting entities and agencies and persons may mutually agree to alternative dispute mechanisms with respect to a particular dispute.

**Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary**

Subpart L is organized in the same way as in the proposed rule, and includes § 96.81 (Scope); § 96.82 (The Secretary's response to actions by the accrediting entity); § 96.83 (Suspension or cancellation of accreditation or approval by the Secretary); § 96.84 (Reinstatement of accreditation or approval after suspension or cancellation by the Secretary); § 96.85 (Temporary and permanent debarment

by the Secretary); § 96.86 (Length of debarment period and reapplication after temporary debarment); § 96.87 (Responsibilities of the accredited agency, approved person, and accrediting entity following suspension, cancellation, or debarment by the Secretary); § 96.88 (Review of suspension, cancellation, or debarment by the Secretary); and § 96.89 (Reserved).

We have modified § 96.83(a) and § 96.85(b) to clarify that the Department alone has the discretion to determine whether the conditions for taking action under §§ 96.83 and § 96.85 have been satisfied. In addition, the Department has added new §§ 96.85(b)(2)(ii) and (iii), incorporating directly the provisions of section 204(e) of the IAA, which specifies as grounds for debarment certain egregious failures to comply with home study requirements. Other changes, in particular changes to §§ 96.84, 96.86, and 96.87 paralleling changes made in subpart K, are described below.

#### *Section 96.81—Scope*

1. *Comment:* Two commenters recommend that oversight of agencies and persons should be moved from accrediting entities and the Department to the FTC. A commenter is concerned that the Department lacks expertise and interest in overseeing agencies and persons.

*Response:* The explanation given in the response to comment 7 on § 96.70 above, also applies to this comment. The Department is committed to identifying and working with qualified accrediting entities to oversee agencies and persons.

2. *Comment:* One commenter suggests that the Department create a centralized online database with information on the accreditation status of all agencies and persons.

*Response:* Accrediting entities are required to maintain and make available to the public information on accredited agencies and approved persons, such as their specific accreditation/approval status. (See §§ 96.91 and 96.92). The Department will make available, on its website, the identities of the accrediting entities.

#### *Section 96.82—The Secretary's Response to Actions by the Accrediting Entity*

*Comment:* Several commenters believe that imposing adverse actions on agencies and persons without notification is problematic. They think that § 96.82(b) allows the Department to inform the Hague Permanent Bureau of an adverse action when the party in

question has not had an opportunity to contest the decision from the accrediting entity. To ensure that the rights of agencies and persons are protected, commenters request creation of a detailed appeal process with notice and hearing.

*Response:* In order for the Hague Permanent Bureau to have an accurate list of accredited agencies and approved persons, consistent with our obligations under Article 13 of the Convention, the Hague Permanent Bureau must be notified of changes in status that result from adverse actions, even when the adverse action has been taken without prior notice. Therefore we are not altering § 96.82(b) in response to this comment. We note that §§ 96.84 and 96.86 correspondingly require the Department to notify the Hague Permanent Bureau, as appropriate, when an adverse action has been terminated or withdrawn. For a discussion of the issue of notice in the context of adverse action taken by an accrediting entity, please see the response to the comment on § 96.76.

#### *Section 96.83—Suspension or Cancellation of Accreditation or Approval by the Secretary*

*Comment:* Commenters suggest that the third provision in § 96.83(b), stating that the Department may suspend or cancel accreditation or approval if such action “will protect the interests of children” should be listed first, ahead of furthering U.S. foreign policy or national security interests and protecting the ability of U.S. citizens to adopt children under the Convention.

*Response:* The listing of grounds on which the Department may act is not intended to convey their relative importance, or any sequence in which the grounds will be considered. The Department, nevertheless, made the suggested change. A key objective of both the Convention and the IAA is to ensure that standards are in place that protect the best interests of children.

#### *Section 96.84—Reinstatement of Accreditation or Approval After Suspension or Cancellation by the Secretary*

*Comment:* One commenter opposes the provision allowing an agency or person to apply for reinstatement of accreditation or approval.

*Response:* Section 204(b)(2) of the IAA explicitly allows applications for reinstatement of accreditation or approval by agencies or persons in situations in which the Department is satisfied that the deficiencies that necessitated cancellation have been corrected. Section 96.84 of the rule

tracks these provisions of IAA section 204(b)(2), as well as its provisions on terminating a suspension. The comment nevertheless prompted the Department to add language to § 96.84(a) to specify the narrow grounds on which the agency or person can petition the Department for relief—namely, that deficiencies necessitating the suspension or cancellation have been corrected. Moreover, we note that § 96.84(a) requires that an agency or person authorized to reapply for accreditation or approval generally must reapply to the accrediting entity that handled its prior application, to ensure that the agency or person will be subject to rigorous evaluation.

The Department has also added § 96.84(b) to make clear that nothing in this section prevents the Department from withdrawing a cancellation or suspension upon a finding that the action was based on a mistake of fact or otherwise in error. Please see also the discussion in response to comments on § 96.78.

#### *Section 96.85—Temporary and Permanent Debarment by the Secretary*

*Comment:* The only comments specific to § 96.85 noted agreement with the debarment provisions and the language that defines when the Department is to take action for debarment.

*Response:* No response is required to these comments; as noted in the introduction to the discussion of subpart L, § 96.85 now incorporates the provisions of section 204(e) of the IAA on debarment for certain egregious failures to comply with home study requirements.

#### *Section 96.86—Length of Debarment Period and Reapplication After Temporary Debarment*

*Comment:* The comments on § 96.78 expressing concern that the proposed rule would force an agency or person to admit guilt before challenging an adverse action were also made with respect to this section.

*Response:* The Department has added § 96.86(c) to clarify that this section does not prevent the Department from withdrawing a debarment if it was based on factual or other error. Please see also the discussion responding to comments on § 96.78.

*Section 96.87—Responsibilities of the Accredited Agency, Approved Person, and Accrediting Entity Following Suspension, Cancellation, or Debarment by the Secretary*

*Comment:* Some commenters expressed concern about the case transfer provisions in the rule.

*Response:* As discussed above, the Department has modified § 96.87 to reflect the fact that, if accreditation or approval is cancelled, the plans required by §§ 96.33(e) and 96.42(d) will govern any transfer of Convention cases and adoption records. As with § 96.77, the provision has been modified to require the accrediting entity to assist the Department in helping the agency or person to transfer its Convention cases and adoption records if the agency or person is unable to transfer Convention cases and adoption records as planned. Please see the response to comment 2 on § 96.77 for further explanation.

*Section 96.88—Review of Suspension, Cancellation, or Debarment by the Secretary*

*Comment:* Commenters express concern about the absence of administrative review and the possibility of “a few entities or individuals being able to essentially shut down an agency with no recourse.” Commenters request that a “full review board” for the Department’s adverse actions be put in place.

*Response:* The IAA does not provide for administrative review of suspension, cancellation or debarment by the Department, except to the extent that section 204(b)(2) of the IAA provides that the Department may terminate a suspension or authorize re-application for accreditation or approval if it is satisfied that the deficiencies underlying a suspension or cancellation of accreditation or approval have been corrected. Reinstatement in such circumstances is provided for under § 96.84 of the rule, and the Department has modified § 96.88(a) to clarify the point that this is the only non-judicial review procedure available. Sections 96.84(b) and 96.86(c) have been added to clarify that the Department may withdraw a cancellation, suspension, or debarment if the Department concludes that the action was based on a mistake of fact or was otherwise in error. These provisions are consistent with the overall structure of the IAA.

**Subpart M—Dissemination and Reporting of Information by Accrediting Entities**

Subpart M is organized in the same way as in the proposed rule, and

includes § 96.90 (Scope); § 96.91 (Dissemination of information to the public about accreditation and approval status); § 96.92 (Dissemination of information to the public about complaints against accredited agencies and approved persons); and § 96.93 (Reports to the Secretary about accredited agencies and approved persons and their activities); and § 96.94 (Reserved).

Sections 96.92–96.93 have been revised in response to public comment, as described below. In addition, while § 96.91 of the proposed rule would have required an accrediting entity to provide a summary of the accreditation or approval study of an agency or person upon request, after further consideration of the burden and cost impact on accrediting entities, we have eliminated this provision. We believe that the other information accrediting entities are required to give the public is sufficient to allow prospective adoptive parent(s) to make informed decisions, and eliminating this requirement will assist in minimizing accreditation fees.

*Section 96.91—Dissemination of Information to the Public About Accreditation and Approval Status*

1. *Comment:* Several commenters suggest that information about accreditation and approval status should be posted on the Department’s website. One commenter also suggests that information be made available by e-mail upon request.

*Response:* Information about accreditation and approval status will be available through the accrediting entities. The Department will have information about all accrediting entities posted on its website. Also, the Department will send the names of accredited agencies and approved persons to the Hague Permanent Bureau for dissemination on its website. These arrangements are consistent with the respective roles of the accrediting entities and the Department under the IAA.

2. *Comment:* Commenters request that the Department clarify the scope and methods to be used to disclose information to the public regarding accredited agencies and approved persons under § 96.91. One commenter further suggests that an accrediting entity be afforded the discretion to make the information that it is required to make available on a quarterly basis under § 96.91(a), available on a more regular basis.

*Response:* The Department does not believe that it is necessary to set out in the regulation the methods which accrediting entities may use to meet the

disclosure requirements of § 96.91. The Department expects to address this issue in the agreements with the accrediting entities.

Once the Convention has entered into force for the United States, accrediting entities will be required to make available to the public information about accredited agencies and approved persons on a quarterly basis, pursuant to § 96.91(a). Section 96.91(a) does not prohibit accrediting entities from making such information available on a more frequent basis. The information that accrediting entities will be required to disclose to the public quarterly includes the names and contact information for each agency and person it has accredited or approved and the names of agencies and persons to which it has denied accreditation or approval that have not subsequently been accredited or approved. Accrediting entities will also have to provide the names of those who have been subject to suspension, cancellation, or refusal to renew accreditation or approval; those who have had their temporary accreditation withdrawn; or who have been debarred, as well as any information specifically authorized in writing by the accredited agency or approved person to be disclosed to the public.

In addition, upon request, accrediting entities will have to make available to the public confirmation of whether a specific agency or person has been subject to suspension, cancellation, refusal to renew, or withdrawal of temporary accreditation or approval or has been debarred, and a brief statement of the reasons for the action. Upon request, accrediting entities will also have to confirm whether an agency or person has a pending application for accreditation or approval and the status of the application. Finally, once the Convention has entered into force for the United States, accrediting entities will be required to disclose information, upon request, on substantiated complaints under § 96.92.

3. *Comment:* One commenter suggests that accredited agencies and approved persons should provide information required under subpart M to parent(s) immediately upon initiating a relationship. Another commenter thinks that agencies or persons should be required to disclose any adverse actions or complaints directed against them to parent(s) before a referral of a child is made, so that prospective adoptive parent(s) can make an informed decision regarding that agency or person. Another commenter supports the provision as written.

*Response:* The Department is not revising § 96.91 to apply to agencies and persons as well as to accrediting entities. The purpose of this provision is to allow clients, if they wish, to get critical information from one source—the accrediting entities—instead of by seeking information from each individual agency or person. We believe that requiring accrediting entities to provide information to the public about accredited agencies and approved persons will assist the public in making informed decisions when choosing an adoption service provider. Clients will, of course, also remain free to seek information directly from agencies and persons.

We note also that § 96.39 of subpart F sets forth standards on information disclosure by agencies and persons to the general public and to prospective clients, and § 96.41 sets forth standards requiring agencies and persons to provide information on complaint procedures to clients.

4. *Comment:* A commenter recommends adding a fourth provision under § 96.91(b) that requires that each accrediting entity make available to individual members of the public upon specific request any information concerning a specific agency or person except: (A) information identifying prospective or actual adoptive parents, birth parents or adoptees; (B) complaints which have been determined to be false or unsubstantiated; and (C) complaints being investigated by the Complaint Registry or accrediting entity that were filed less than six months earlier.

*Response:* Requiring accrediting entities to provide “any” information concerning a specific agency or person would be too burdensome on accrediting entities. While subpart M is intended to help clients make informed decisions about accredited agencies and approved persons, it only indirectly furthers the main purpose of the IAA and these implementing regulations, which is to ensure that agencies and persons comply with the Convention and the IAA. Thus, we have not modified subpart M to impose such a public reporting requirement on accrediting entities.

*Section 96.92—Dissemination of Information to the Public About Complaints Against Accredited Agencies and Approved Persons*

*Comment:* Several commenters believe that requiring the accrediting entity to disclose information on both substantiated and unsubstantiated complaints against an agency or person could promote rumors, speculation, or

otherwise undue prejudice toward that agency or person. Commenters recommend that only information about substantiated complaints should be made available to the public.

*Response:* The Department has revised § 96.92 to require reporting only of substantiated complaints. The Department believes that requiring accrediting entities to report to the public only substantiated complaints against an agency or person is sufficient protection for potential clients. It will also reduce the reporting burden on accrediting entities and may, therefore, reduce the cost of accreditation or approval.

*Section 96.93—Reports to the Secretary About Accredited Agencies and Approved Persons and Their Activities*

*Comment:* One commenter recommends that reports to the Department about accredited agencies and approved persons should be made public because the information contained would be useful to prospective adoptive parent(s) who are evaluating those agencies and persons. Others are concerned about the cost and burden of requiring accrediting entities to make quarterly reports to the Department.

*Response:* Some of the information contained in an accrediting entity’s report to the Department will be available to the public, upon request to the accrediting entity, pursuant to §§ 96.91 and 96.92. We do not think it necessary or appropriate to include further provisions addressing when and how any other portions of the accrediting entities’ reports to the Department would be available to the public, because such disclosures would be covered by Federal laws on access to records and information.

In response to general concerns about the potential impact of the reporting requirements on accreditation fees, we have modified § 96.93 so that the reports to the Department under § 96.93(a) are required on a semi-annual rather than a quarterly basis.

**Subpart N—Procedures and Standards Relating to Temporary Accreditation**

Subpart N is organized in the same way as in the proposed rule, and includes § 96.95 (Scope); § 96.96 (Eligibility requirements for temporary accreditation); § 96.97 (Application procedures for temporary accreditation); § 96.98 (Length of temporary accreditation period); § 96.99 (Converting an application for temporary accreditation to an application for full accreditation); § 96.100 (Procedures for evaluating

applicants for temporary accreditation); § 96.101 (Notification of temporary accreditation decisions); § 96.102 (Review of temporary accreditation decisions); § 96.103 (Oversight by accrediting entities); § 96.104 (Performance standards for temporary accreditation); § 96.105 (Adverse action against a temporarily accredited agency by an accrediting entity); § 96.106 (Review of the withdrawal of temporary accreditation by an accrediting entity); § 96.107 (Adverse action against a temporarily accredited agency by the Secretary); § 96.108 (Review of the withdrawal of temporary accreditation by the Secretary); § 96.109 (Effect of the withdrawal of temporary accreditation by the Secretary); § 96.110 (Dissemination and reporting of information about temporarily accredited agencies); and § 96.111 (Fees charged for temporary accreditation).

The Department has made a number of changes to the provisions of subpart N to parallel changes made in the subparts of the rule that apply to accreditation and approval. As described below, we have also removed from § 96.103 language that was duplicative of language in § 96.111, and have further clarified how fees may be charged for site visits.

*Section 96.95—Scope*

*Comment:* One commenter believes that the temporary accreditation process goes against the intention of Congress and does not address the needs of small agencies for which the provision was intended. The commenter states that the IAA used the term “registration” to describe the “phase-in” process, which would imply less time and expense than temporary accreditation.

*Response:* We have not changed the provisions on temporary accreditation because we believe they are consistent with both the IAA and the Convention. The IAA does use the term “registration” in the heading of the section on temporary accreditation, but it is clear that, regardless of what it is called, the short-term transitional accreditation process is to be more than a mere sign-up procedure. (Allowing agencies to conduct Convention adoptions based on a mere sign-up procedure would be difficult, if not impossible, to justify as consistent with the Convention.) The IAA criteria for applying for temporary accreditation are less comprehensive than those required for full accreditation, yet the statute still requires that an agency demonstrate basic competency to perform Convention adoptions.

The Department deliberately uses the term temporary accreditation, rather

than “registration,” to highlight that temporary accreditation, as envisioned in the IAA, is a stepping-stone to full accreditation; temporary accreditation is meant to allow small agencies a short period of time to gather the information and resources necessary to achieve full accreditation. Temporary accreditation is not a permanent, ongoing status for small agencies, but is available only as the Convention first enters into force for the United States, and is a status limited to, at most, two years. Eventually, small agencies must meet the full accreditation standards in subpart F to provide adoption services in Convention cases, or choose to provide adoption services in Convention cases only as supervised or exempted providers.

The eligibility requirements for temporary accreditation are more detailed than the broadly worded criteria in the IAA, but they are all based in the statute. For example, section 203(c)(3)(E) of the IAA requires that an agency that wishes to get temporary accreditation show that it “has not been found to be involved in any improper conduct relating to intercountry adoptions.” The Department’s regulations at § 96.96(a)(5) describe what agency behavior would be considered “improper conduct” including, (i) a suspension of its State license; (ii) a recent finding of fault or liability in an administrative or judicial action; or (iii) a recent finding of criminal fraud or financial misconduct. These requirements, together with the performance standards required to maintain temporary accreditation set out in § 96.104, are still significantly less involved than the standards for full accreditation. Given the difference between the requirements for full and temporary accreditation, it should take small agencies less time and expense to obtain temporary accreditation than it would to get full accreditation. The Department believes that the temporary accreditation framework will help maintain a diverse array of adoption service providers that are available to place children eligible for adoption and to assist birth families and prospective adoptive families. At the same time, the temporary accreditation framework will help to ensure that temporarily accredited agencies can still comply with the basic provisions of the Convention and the IAA.

#### *Section 96.96—Eligibility Requirements for Temporary Accreditation*

1. *Comment:* Commenters support the temporary accreditation provision, particularly to the extent it may benefit small agencies.

*Response:* No response is required to these comments.

2. *Comment:* One commenter states that the current threshold for the number of cases in which adoption services are performed by an agency seeking temporary accreditation does not offer sufficient relief for small agencies. Many commenters request that the threshold for temporary accreditation be based solely upon the number of Convention cases. Other commenters want the threshold to be raised to 200 cases for one year or 100 cases for two years of temporary accreditation.

*Response:* The threshold number of cases for temporary accreditation is established by section 203(c) of the IAA, which provides that an agency can get temporary accreditation for a period of one year if it has “provided adoption services in fewer than 100 intercountry adoptions in the preceding calendar year,” and for two years if it has “provided adoption services in fewer than 50 intercountry adoptions in the preceding calendar year.”

Consistent with the IAA, all “intercountry adoptions,” will count toward the threshold number. Prior to entry into force of the Convention for the United States, no Convention adoptions would have been performed in the United States, regardless of the size of the agency. There is also no basis for reading the term “intercountry adoptions” in this provision of the IAA to mean “intercountry adoptions that would have been Convention adoptions had the Convention been in force in the United States at the time they were performed.”

3. *Comment:* One commenter strongly suggests that there should be no extensions of temporary accreditation, under any circumstances.

*Response:* The rule does not allow any such extensions. Under the IAA, temporary accreditation is a one-time status that is available only for a period of time immediately after the Convention enters into force.

4. *Comment:* One commenter requests clarification of what constitutes a small agency under § 96.96(a)(1). It is an agency that arranges approximately 20 adoptions per year, but that also conducts over 100 home studies. It questions whether it would qualify as a small agency, given that home studies are considered an adoption service.

*Response:* After careful review, we have concluded that an agency that arranges 20 adoptions and conducts over 100 home studies a year would not qualify for temporary accreditation. Section 203(c) of the IAA provides expressly that agencies that have

“provided adoption services in fewer than 100 intercountry adoptions” in the calendar year preceding entry into force of the Convention can be temporarily accredited for a one year period (or for a two year period, if performing adoption services in fewer than 50 intercountry adoptions). As the commenter correctly notes, “adoption service” is defined in section 3 of the IAA, and is used throughout the IAA, to include home studies. Accordingly, the commenting agency is providing one of the six enumerated “adoption services” in over 100 cases. Assuming these services were provided by the agency in the calendar year preceding entry into force of the Convention, the agency would not qualify for temporary accreditation.

The fact that such an agency cannot qualify for temporary accreditation does not mean that it must pursue full accreditation to continue its work, however. After the Convention enters into force, it could act as an “exempted provider” in those cases in which the agency performs only home studies, and it could act as a supervised provider in those few Convention adoptions in which it performs additional adoption services.

The Department considered whether, notwithstanding its plain language, section 203(c) of the IAA could be construed to exclude home studies from adoption services on the possible ground that, after the Convention comes into force, providers that perform only a home or child background study, and no other adoption service in a case, will be excepted by IAA section 201(b) from the section 201(a) requirement that all adoption services be provided by an accredited, approved, or supervised provider. We are satisfied that the answer to this question is no. As just explained, the plain language of section 203(c) directs us to consider all cases in which adoption services are provided when determining eligibility for temporary accreditation, and home studies are an adoption service. While section 201(b) exempts home or child background study providers from meeting the accreditation, approval, or supervision requirement when the home or child background study is the only service they provide in a case, the exemption does not change the fact that a home or child background study is an adoption service. Instead the exemption recognizes special circumstances in which a provider will not be required to be accredited, approved or supervised. Accreditation, approval, or supervision of home or child background study providers is still required if the home or child background study is performed in



conjunction with other adoption services on a case. Moreover, the purpose of IAA section 203(c) is to determine who is qualified for temporary accreditation based on the historic volume of cases in which an applicant has provided adoption services prior to entry into force of the Convention. This retrospective rule has an entirely different function than the forward-looking rule for determining, under IAA section 201, which providers need to be accredited, approved, or supervised after entry into force of the Convention. The fact that providers of home studies in some circumstances do not need to be accredited, approved, or supervised after entry into force is not inconsistent with the fact that home studies are counted as “adoption services” for the purposes of determining whether an agency that wishes to become accredited can first be temporarily accredited.

Accordingly, assuming the commenter performs its current volume of adoption services in the year preceding entry into force of the Convention, the options available to the commenter under the statute and regulations will be either to obtain full accreditation, or to operate as an exempted or supervised provider.

5. *Comment:* A commenter suggests that limiting eligibility to agencies that have provided adoption services for three years prior to the transitional application deadline (TAD) will exclude small agencies that have recently received their State licenses. Others think requiring a license for five years prior to the TAD is more appropriate. One commenter suggests that temporary accreditation should be available to any group that wishes to form a new adoption agency, otherwise the creation of new agencies will be discouraged, and the number of agencies available to prospective adoptive parent(s) will be severely limited.

*Response:* The requirement that an agency must have provided adoption services for at least three years prior to the TAD before it is eligible for temporary accreditation was taken directly from section 203(c)(3)(B) of the IAA. The Department believes that it is unnecessary—and would be inconsistent with the purpose of the temporary accreditation provisions of the IAA—to require by regulation that small agencies have provided services for a specific time period longer than 3 years.

6. *Comment:* Some commenters suggest that agencies should be subject to more stringent requirements for temporary accreditation than those in the proposed rule.

*Response:* The Department is not modifying the standards for temporary accreditation based on this comment. We believe that they are consistent with the IAA’s provisions on temporary accreditation and strike the proper balance between ensuring that agencies can provide adoption services in the manner required under the IAA and the Convention and minimizing the impact on small agencies.

#### *Section 96.98—Length of Temporary Accreditation Period*

*Comment:* One commenter suggests that the period of temporary accreditation be one year, not two years.

*Response:* The Department does not have the authority to vary the lengths of the temporary accreditation periods from the periods set in the IAA. Section 203(c) of the IAA provides that an agency can get temporary accreditation for a period of one year if it has “provided adoption services in fewer than 100 intercountry adoptions in the preceding calendar year,” and for two years if it has “provided adoption services in fewer than 50 intercountry adoptions in the preceding calendar year.”

#### *Section 96.100—Procedures for Evaluating Applicants for Temporary Accreditation*

*Comment:* A commenter supports allowing accrediting entities to use site visits to determine an agency’s eligibility for temporary accreditation, but the commenter recommends that accrediting agencies rely primarily on documentation when evaluating applications for temporary accreditation in order to minimize the burden and cost for small agencies.

*Response:* The Department agrees with the thrust of this comment but does not believe the regulation should be modified to specifically require primary reliance on documentation. The rule, as written, strikes an appropriate balance between minimizing the burden and cost for small agencies to get temporarily accredited and ensuring that temporarily accredited agencies can provide satisfactory adoption services to families. If the accrediting entity is satisfied, after reviewing the documentation submitted by an agency, that an agency is qualified for temporary accreditation, then § 96.100(b) permits the accrediting entity to forego a site visit.

#### *Section 96.102—Review of Temporary Accreditation Decisions*

*Comment:* Several commenters raise concerns over the limits of judicial and/

or administrative review of a denial of full or temporary accreditation.

*Response:* These rules treat denial of temporary accreditation the same as the denial of an initial application for full accreditation or approval. For a discussion of why this rule does not permit review of initial denials of full or temporary accreditation, please see the response to comments on § 96.59.

#### *Section 96.103—Oversight by Accrediting Entities*

1. *Comment:* Several commenters think that the provision in § 96.103(b) in the proposed rule allowing the accrediting entity to assess additional fees for actual costs incurred is arbitrary because the accrediting entity, at its discretion, can visit the agency at the agency’s expense. One commenter suggested that the Department set parameters for extraordinary cases to protect agencies from unnecessary fees.

*Response:* The Department does not believe it is appropriate to assume that designated accrediting entities will arbitrarily conduct site visits in order to generate fees. Accreditation fees may not exceed actual costs, so conducting site visits will not be a financial windfall for accrediting entities.

The Department has, however, eliminated from § 96.103 language duplicative of § 96.111’s authorization of charges and fees related to site visits. The ability of an accrediting entity to charge fees for a site visit is unaffected by this change. The Department has also added language to § 96.111(a) to clarify that an accrediting entity may require the payment of estimated additional fees for a site visit in advance, subject to a refund of any overcharge.

2. *Comment:* One commenter suggests that the Department itself closely monitor small agencies.

*Response:* The accrediting entities will have primary oversight responsibility for agencies that they have granted temporary accreditation. The Department, nevertheless, retains oversight responsibility for agencies of all sizes. The Department has independent authority under § 96.107 to withdraw an agency’s temporary accreditation if the agency is substantially out of compliance with the standards in § 96.104 and the accrediting entity has failed or refused to take appropriate enforcement action, or if the Department finds such action will protect the interests of children, further U.S. foreign policy or national security interests, or protect the ability of U.S. citizens to adopt children under the Convention.

*Section 96.105—Adverse Action Against a Temporarily Accredited Agency by an Accrediting Entity*

*Comment:* Comments pertaining to §§ 96.76 and 96.77 also relate to this temporary accreditation counterpart.

*Response:* Changes made to § 96.105 and § 96.109(c) were made to conform to the approach taken in § 96.76. Please see the discussion under §§ 96.76 and 96.77 for relevant comments and responses.

*Section 96.106—Review of the Withdrawal of Temporary Accreditation by the Accrediting Entity*

*Comment:* Comments pertaining to § 96.79(a) also relate to this section as its temporary accreditation counterpart.

*Response:* The Department made minor changes to § 96.106(a) to conform with the approach taken in § 96.79(a).

*Section 96.107—Adverse Action Against a Temporarily Accredited Agency by the Secretary*

*Comment:* Comments pertaining to § 96.83 also relate to this section as its temporary accreditation counterpart.

*Response:* The Department made conforming changes to § 96.107(b) consistent with changes that it made to § 96.83(b). Please see the discussion under § 96.83 for the relevant comment and response.

*Section 96.109—Effect of the Withdrawal of Temporary Accreditation by the Accrediting Entity or the Secretary*

*Comment:* Comments pertaining to §§ 96.77(b) and (c) also relate to this section as its temporary accreditation counterpart.

*Response:* The Department made conforming changes to § 96.109(a) and (b) consistent with changes that it made to § 96.77(b) and (c). Please see the discussion under § 96.77(b) for relevant comments and responses. In addition, the Department clarified the related performance standard, in § 96.105(k), to provide that the closure plan must include provisions for organized closure and reimbursements to clients, mirroring a change made to § 96.33(e). Please see also the response to comment 9 on § 96.33.

## V. Regulatory Review

### A. Regulatory Flexibility Act/Executive Order 13272: Small Business

The Department has reviewed the final rule's impact on small agencies and persons in accordance with the final regulatory analysis requirements in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The RFA requires an agency to perform a final regulatory

flexibility analysis at the time that a rule is finalized to determine the regulatory impact of the rulemaking on small entities. However, if the agency does not believe that the rule will have a significant economic impact on a substantial number of small entities the agency may publish a certification in lieu of a regulatory analysis, provided that the certification is accompanied by a factual basis. As stated in the certification for the proposed rule there are between 420 and 600 adoption service providers, the vast majority of which are small, that may have to comply with this rulemaking. Accordingly, the rule will impact a substantial number of small entities. However, for the reasons provided below, the Department does not believe that the economic impact will be significant.

At the request of the Small Business Administration (SBA), we included in the notice of proposed rulemaking the following questions on small entity impact for public comment: (1) Will most small agencies be eligible for temporary accreditation under the criteria provided in subpart N? (2) How many agencies are likely to seek temporary accreditation rather than full accreditation? (3) What are the accrediting entities likely to charge the agencies for the temporary accreditation process? (4) What are the estimated costs agencies will have to expend to comply with the standards in subpart N? (5) Will small agencies be negatively impacted if they are unable to qualify for temporary accreditation? We received no comments responding specifically to the questions posed by the SBA, but we summarize and address below the comments which we did receive related to the impact on small entities of this rule:

*Comment:* Six commenters expressed concern about accreditation fees and believe that accreditation fees could range from \$45,000 to \$100,000 per applicant.

*Response:* Consistent with the IAA, accrediting entities will be authorized to charge agencies and persons fees to cover the cost of conducting the accreditation process, which in the case of full accreditation or approval will include: (1) Reviewing an applicant's written application; (2) verifying the information the applicant provided by examining underlying documentation; (3) considering written complaints; (4) conducting off-site or in-person interviews; (5) consulting with relevant State licensing authorities; (6) conducting a site visit; and (7) taking adverse action and defending any legal challenges to enforcement measures.

Providing for these core duties is unavoidable.

We have nevertheless sought to minimize the impact of accreditation/approval fees in a number of ways that will benefit small agencies and persons. First, there are safeguards on accrediting entity fees in the IAA that are mirrored in the final rule. In particular, the IAA prohibits such fees from exceeding the costs of accreditation/approval. In addition, the Department must approve the accreditation/approval fees assessed by accrediting entities. In setting fees, the Department and the accrediting entities must consider the relative size, the geographic location, and the number of Convention adoption cases managed by the agencies or persons expected to apply, thus there will be consideration of the impact of proposed fees on small agencies and persons. A fee schedule submitted to the Department for approval must contain: (1) A list of separate non-refundable fees for Convention accreditation and Convention approval; (2) the cost of all activities associated with the accreditation/approval cycle; and (3) the cost of obtaining temporary accreditation services (if provided by the accrediting entity). Also, accrediting entities will be required to provide clear information on fees to the public, including making their fee schedules available to the public and listing the fees to be charged to the applicant in a contract between the parties. The Department believes that the safeguards in the final rule will minimize the costs of accreditation fees for small entities. The Department, however, cannot predict or guarantee any particular range of fees prior to designating the accrediting entities and approving their fee schedules.

Second, small agencies may pursue the option of temporary accreditation. Small agencies that fulfill certain criteria may be temporarily accredited for one or two years, depending upon size. The applicable standards for temporary accreditation are less comprehensive than the standards for full accreditation. Also, obtaining temporary accreditation is an abbreviated process—a site visit is optional, not required. The Department expects the fees associated with the cost of temporary accreditation to be less than the fees for full accreditation.

Third, an agency or person can assist with adoptions under the Convention without becoming accredited or approved, and can therefore avoid paying accreditation/approval fees by acting under the supervision of an accredited agency or approved person.

Finally, the IAA and the regulations exempt certain service providers from the requirements of accreditation/approval. For example, a social work professional or organization that performs a home study or child background study in the United States, but is not currently providing and has not previously provided any other adoption service in connection with a particular Convention adoption, is an "exempted provider." Exempted providers do not have to be accredited, temporarily accredited, approved, or supervised by a primary provider. Thus small home study providers and individual social workers that provide only home studies or child background studies will not have to pay to become accredited or approved.

*Comment:* One commenter is concerned that private accrediting entities will charge excessive fees for travel and accommodations during the accreditation process.

*Response:* We address the costs of site visit evaluations in this final rule. Section 96.8(b)(2) provides that separate fees based on actual costs incurred may be charged for the travel and maintenance of evaluators, and § 96.111(a) also requires that additional fees be paid for actual costs involved with site visits to temporarily accredited agencies. These costs are easily verified through receipts for travel expenses. Additionally, State licensing authorities and nonprofit entities chosen to be accrediting entities are likely to have travel policies that provide internal limits on payments for expenses such as travel, meals, and accommodations. In addition, the Department can address this issue in the agreements with the accrediting entities. The rule provides sufficient safeguards to ensure that the travel charges are not burdensome to small entities and to ensure the reasonableness of charges for the travel and maintenance of site evaluators.

*Comment:* Nine commenters believe that it will create great economic hardship for small agencies and persons to comply with the standards found in subpart F. A few commenters write that complying with the standards of subpart F will be so costly that many small agencies and persons could be forced to close. Other commenters are concerned that increased costs for agencies and persons will be passed on to prospective adoptive parent(s).

*Response:* The Department is aware that the cost of providing adoption services in Convention cases will be affected by the cost of complying with the standards in subpart F, and discussed that impact at length in the explanatory statement to the proposed

rule issued on September 15, 2003. The proposed rule preamble at Section VI, A contains an analysis of the impact on small entities. After considering the public comments, the Department continues to believe that the basis and conclusions of that analysis are sound. That analysis therefore is hereby incorporated by reference and available at 68 FR 54064, 54089–54090 (September 15, 2003).

We have taken a number of steps, however, in the final rule to be responsive to the comments on the costs of compliance, while at the same time keeping in mind the specific IAA requirements for certain standards and the overall statutory goals of protecting the best interests of a child and of protecting birth parents, adoptive parents, and children from abuses. For example, we revisited and changed, to lower the impact on small entities, the standards relating to the following issues:

- Risk assessment; primary provider's liability; waivers of liability;
- Budget and audit;
- Training and education of social service personnel.

Under the final rule's standards on risk assessment and liability, agencies and persons are not required to retain an independent provider to conduct a risk assessment. Instead, they may use in-house personnel, thereby reducing the cost of an assessment. Moreover, we revised §§ 96.45 and 96.46 so that primary providers are no longer required to assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of contracted adoption services or to maintain a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers. In addition, § 96.39, which prohibited agencies and persons from using blanket waivers of liability, has been changed so that agencies and persons may ask prospective adoptive parent(s) to sign a waiver after full disclosure of information as long as the waiver complies with applicable State law and is limited, specific, and based on risks that have been discussed and explained in the adoption services contract. By changing these standards, we believe that we have decreased the risk exposure of primary providers so that they will more easily obtain the required insurance at a reasonable cost. In total, the revision of these standards makes compliance easier by decreasing the cost and burden on small agencies and persons.

With regard to budget and audit standards, we modified the language of § 96.33 to make meeting the budget standards more practicable while still maintaining a focus on an agency's or person's financial soundness. The proposed rule required agencies to keep three months of cash reserves on hand. The final rule instead requires the assets on-hand to be sufficient to meet two months of expenses and allows agencies to satisfy the standard by including non-cash assets. In addition, the agency or person's finances are subject to an independent audit every four years instead of annually as initially proposed. Requiring less cash on hand and reducing the frequency of independent audits will enable small agencies and persons to demonstrate financial soundness without incurring significant new costs.

We have also considered the concerns of commenters who believed that the education and experience requirements for social service personnel would be too costly and have made cost-saving changes. The final rule differs from the proposed rule in that non-supervisory employees who are conducting home studies or child background studies are not required to hold a master's degree in social work. The final rule requires that these personnel be authorized or licensed to complete a home study under the laws of the State in which they practice, meet DHS requirements for home study preparers, and be monitored by a qualified social work supervisor. Likewise, we reduced from 20 hours each year to 30 hours every two years the training requirement for employees who provide adoption services that involve clinical skills and judgment.

While some commenters also were concerned about the potential cost of standards involving data collection, the Department did not significantly modify the standards related to data collection. Section 104 of the IAA lists the information and data that must be collected and reported to Congress annually. To ensure the availability of this information, § 96.43 of the rule still requires accredited agencies and approved persons who are acting as primary providers to track cases, to collect data, and to report the information as set forth in the rule.

The Department also has considered input on the costs to agencies and persons of complying with the standards in subpart F. The cost information from commenters ranged widely—some commenters predicted complying with subpart F could cost from \$75,000 to \$100,000 per agency or person. Others suggested that a range of

\$2,000 to \$3,000 per case in increased costs that agencies and persons would have to charge for adoption services. (Commenters were not always clear about whether these projections included accreditation/approval fees or just the cost of complying with the standards in subpart F.) We reviewed the standards, and concluded that they are either required by section 203(b) of the IAA or will otherwise further the goals of the IAA.

In summary, the Department asserts that the economic impact on small entities will not be significant. The final rule allows agencies and persons to choose to be accredited or approved or to act as supervised providers; largely exempts certain types of very small providers, specifically home study and child background study preparers; includes a special temporary accreditation procedure just for small agencies; and uses a substantial compliance structure, so that entities are not required to comply fully with every single standard in order to be accredited or approved. The Department hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### *B. The Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

#### *C. The Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104–4; 109 Stat. 48; 2 U.S.C. 1532, generally requires agencies to prepare a statement, including cost-benefit and other analyses, before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the private sector. Section 4 of UFMA, 2 U.S.C. 1503, excludes legislation necessary for implementation of treaty obligations. The IAA falls within this exclusion because it is the implementing legislation for the Convention. In any

event, this rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Moreover, because this rule will not significantly or uniquely affect small governments, section 203 of UFMA, 2 U.S.C. 1533, does not require preparation of a small government agency plan in connection with it.

#### *D. Executive Order 13132: Federalism*

A rule has federalism implications under Executive Order 13132 if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The federalism implications of the rule in light of the requirements of the IAA are discussed in Section IV paragraph (D) of the proposed rule in the preamble. In light of that analysis, the Department finds that this regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that this rule does not have sufficient federalism implications to require consultations or to warrant the preparation of a federalism summary impact statement under section 6 of Executive Order 13132.

*Comment:* Some commenters argued that State licensing should be sufficient for Convention accreditation and that the Department should not require agencies to become accredited at the Federal level, while others argued that the regulations deferred too much to State licensing of agencies.

*Response:* Federal accreditation standards for intercountry adoptions under the Convention are required to implement the Convention and the IAA; State licensing or authorization to provide adoption services is not sufficient to meet the requirements of the Convention or the IAA. While the Department considered State licensing practices in crafting the rule, as required by section 203(a)(2) of the IAA, the rule contains Federal standards related specifically to the minimum standards of section 203(b) of the IAA. These IAA-related standards, and standards related to compliance with the Convention, may or may not be part of a particular State's licensing requirements for adoption agencies.

#### *E. Executive Order 12866: Regulatory Review*

This regulation has been reviewed by the Office of Management and Budget.

#### *F. Executive Order 12988: Civil Justice Reform*

The Department has reviewed these regulations in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation risks, establish clear legal standards, and reduce burden. The Department has made every reasonable effort to ensure compliance with the requirements in Executive Order 12988.

#### *G. The Paperwork Reduction Act of 1995*

This rule does not impose information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C., Chapter 35. Section 503(c) of the IAA specifically exempts from the PRA information collection for several purposes, including information collections for purposes of IAA section 202(b)(4), which relates to data collection, records maintenance, and reporting by the accrediting entities. In accord with this and the other IAA exemptions from the PRA, at the time of the proposed rule the Department determined that all of the collections of information contained in the rule were exempt from PRA requirements, with the exception of the third-party disclosures contained in §§ 96.91 and 96.92 of subpart M. The Department has modified § 96.91 and § 96.92 and, after re-examining the language, purpose, and history of IAA section 503(c)'s broad PRA exemption addressing the information collection and management duties of accrediting entities, has concluded that the disclosure requirements in these sections, like the rest of the information collections in this rule, are exempt from the PRA. The explanation of the IAA exemptions to the PRA were explained in the Department's preamble to the proposed rule published on September 15, 2003 (Section IV, paragraph F), which is incorporated herein by reference, to the extent that it is consistent with our conclusion that all collections in the final rule are exempt from the PRA. Consistent with this conclusion, the request for approval of an information collection that was submitted to OMB for review and clearance concurrent with the notice of proposed rulemaking has been withdrawn. The principal practical effect of recognizing this exemption is that the disclosure requirements under § 96.91 and § 96.92 will not have to be reviewed under the

PRA every three years in order to remain effective.

Although the PRA does not apply to these sections as they have been revised, the Department has remained attentive to the regulatory burden issues associated with them, and has considered the one comment received on the burden estimates for the third-party disclosure requirements contained in §§ 96.91 and 96.92. The commenter suggests that no accurate estimate of PRA burden hours can be made, and also suggests increasing the estimate of burden hours.

The Department did subsequent research and revised its burden estimates. We acknowledge that, at this time, it is difficult to estimate burdens accurately without knowing the exact numbers of agencies and persons that will apply for accreditation or approval. Nevertheless, we used information from potential accrediting entities to estimate the anticipated burden of the third-party disclosure duties required under subpart M. At the time we did the original estimates, we believed we might have up to nine accrediting entities. We currently have six candidates eligible to become accrediting entities. In response to this comment, we contacted all six current accrediting entity candidates and asked them to estimate the additional burden in hours and dollars to comply with the third-party disclosure requirements set forth in § 96.91 (Dissemination of information to the public about accreditation and approval status) and § 96.92 (Dissemination of information to the public about complaints against accredited agencies and approved persons) of the proposed rule. Those estimates ranged from less than 26 hours per year to as high as 459 hours per year. The Department thought it prudent to be conservative, so we used the highest estimate we were given, 459 hours, which added an additional 94 hours per year to our previous estimate. In addition, using the highest cost estimate, we added an additional \$1,924.00 per year to our previous estimate for yearly maintenance costs, for an estimated annual maintenance cost burden of \$12,879.00. While these average burden estimates each increased slightly, the overall burden estimate went down because the number of eligible accrediting entity candidates has decreased from 9 to 6. Therefore, each estimate was multiplied by 6, rather than 9, to get our total annual burden estimates. Thus, our new burden estimate for the proposed rule would be: 2754 hours per year (459 hours multiplied by 6); \$63,978.00 for total start-up/capital costs (\$10,663.00

multiplied by 6); and \$77,274.00 in annual operation and maintenance costs (\$12,879.00 multiplied by 6). The burden of the final rule would not be any greater and is likely to be significantly less because the final rule does not require the preparation of a summary of the accreditation or approval study.

#### H. Congressional Review

This rule is not a major rule as defined in 5 U.S.C. Chapter 8.

#### I. The Treasury and General Government Appropriations Act of 1999—Assessment of Federal Regulations and Policies on Families

In light of the subject matter of these regulations and section 654 of the Treasury and General Government Appropriations Act of 1999, Public Law 105–277, 112 Stat. 2681 (1998), the Department has assessed the impact of these regulations on family well-being in accordance with section 654(c) of that Act. This rule implements the Convention and the IAA requirements related to the accreditation and approval of adoption service providers who provide adoption services to families involved in an intercountry adoption. This rule will promote child safety, child and family well-being, and stability for children in need of a permanent family placement through intercountry adoption. The rule will help to ensure that agencies and persons are taking appropriate steps to protect children and to strengthen and support families involved in the intercountry adoption process.

*Comment:* The Department received several comments on the effect of the regulation on family well-being. Commenters point out that the rule will promote child safety and family well-being because the rule is consistent with the overall goal of the Convention, which is to place children eligible for adoption in permanent family placements. Others were concerned that the Convention was not a good idea because they believe adoptions from a country typically decrease substantially when a country becomes a Convention country, even though there are still children eligible for an intercountry adoption. Other commenters were concerned about potential increased costs of adoptions and the negative effect such cost increases might have on the availability of adoption as an option for families.

*Response:* We cannot act contrary to the Convention and the IAA. We note that the Convention's principles and international norms are consistent with section 654's focus on family well-

being. As for the impact of costs on adoptive families, we have revised the rule in many sections to lower the costs of compliance while at the same time trying to ensure that the rule contains standards that are required under the IAA and/or further its objectives.

#### List of Subjects in 22 CFR Part 96

Adoption and foster care, International agreements, Reporting and recordkeeping requirements.

■ Accordingly, the Department adds new part 96 to title 22 of the CFR, chapter I, subchapter J to read as follows:

#### PART 96—ACCREDITATION OF AGENCIES AND APPROVAL OF PERSONS UNDER THE INTERCOUNTRY ADOPTION ACT OF 2000 (IAA)

##### Subpart A—General Provisions

Sec.

- 96.1 Purpose.
- 96.2 Definitions.
- 96.3 [Reserved].

##### Subpart B—Selection, Designation, and Duties of Accrediting Entities

- 96.4 Designation of accrediting entities by the Secretary.
- 96.5 Requirement that the accrediting entity be a nonprofit or public entity.
- 96.6 Performance criteria for designation as an accrediting entity.
- 96.7 Authorities and responsibilities of an accrediting entity.
- 96.8 Fees charged by accrediting entities.
- 96.9 Agreement between the Secretary and the accrediting entity.
- 96.10 Suspension or cancellation of the designation of an accrediting entity by the Secretary.
- 96.11 [Reserved].

##### Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services

- 96.12 Authorized adoption service providers.
- 96.13 Circumstances in which accreditation, approval, or supervision is not required.
- 96.14 Providing adoption services using other providers.
- 96.15 Examples.
- 96.16 Public domestic authorities.
- 96.17 Effective date of accreditation and approval requirements.

##### Subpart D—Application Procedures for Accreditation and Approval

- 96.18 Scope.
- 96.19 Special provision for agencies and persons seeking to be accredited or approved as of the time the Convention enters into force for the United States.
- 96.20 First-time application procedures for accreditation and approval.
- 96.21 Choosing an accrediting entity.
- 96.22 [Reserved].

**Subpart E—Evaluation of Applicants for Accreditation and Approval**

- 96.23 Scope.
- 96.24 Procedures for evaluating applicants for accreditation or approval.
- 96.25 Access to information and documents requested by the accrediting entity.
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- 96.27 Substantive criteria for evaluating applicants for accreditation or approval.
- 96.28 [Reserved].

**Subpart F—Standards for Convention Accreditation and Approval**

- 96.29 Scope.
- Licensing and Corporate Governance
  - 96.30 State licensing.
  - 96.31 Corporate Structure.
  - 96.32 Internal structure and oversight.
- Financial and Risk Management
  - 96.33 Budget, audit, insurance, and risk assessment requirements.
  - 96.34 Compensation.
- Ethical Practices and Responsibilities
  - 96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention.
  - 96.36 Prohibition on child buying.
- Professional Qualifications and Training for Employees
  - 96.37 Education and experience requirements for social service personnel.
  - 96.38 Training requirements for social service personnel.
- Information Disclosure, Fee Practices, and Quality Control Policies and Practices
  - 96.39 Information disclosure and quality control practices.
  - 96.40 Fee policies and procedures.
- Responding to Complaints and Records and Reports Management
  - 96.41 Procedures for responding to complaints and improving service delivery.
  - 96.42 Retention, preservation, and disclosure of adoption records.
  - 96.43 Case tracking, data management, and reporting.
- Service Planning and Delivery
  - 96.44 Acting as primary provider.
  - 96.45 Using supervised providers in the United States.
  - 96.46 Using providers in Convention countries.
- Standards for Cases in Which a Child is Immigrating to the United States (Incoming Cases)
  - 96.47 Preparation of home studies in incoming cases.
  - 96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.
  - 96.49 Provision of medical and social information in incoming cases.
  - 96.50 Placement and post-placement monitoring until final adoption in incoming cases.
  - 96.51 Post-adoption services in incoming cases.

- 96.52 Performance of Convention communication and coordination functions in incoming cases.
- Standards for Cases in Which a Child is Emigrating From the United States (Outgoing Cases)
  - 96.53 Background studies on the child and consents in outgoing cases.
  - 96.54 Placement standards in outgoing cases.
  - 96.55 Performance of Convention communication and coordination functions in outgoing cases.
  - 96.56 [Reserved].

**Subpart G—Decisions on Applications for Accreditation or Approval**

- 96.57 Scope.
- 96.58 Notification of accreditation and approval decisions.
- 96.59 Review of decisions to deny accreditation or approval.
- 96.60 Length of accreditation or approval period.
- 96.61 [Reserved].

**Subpart H—Renewal of Accreditation or Approval**

- 96.62 Scope.
- 96.63 Renewal of accreditation or approval.
- 96.64 [Reserved].

**Subpart I—Routine Oversight by Accrediting Entities**

- 96.65 Scope.
- 96.66 Oversight of accredited agencies and approved persons by the accrediting entity.
- 96.67 [Reserved].

**Subpart J—Oversight Through Review of Complaints**

- 96.68 Scope.
- 96.69 Filing of complaints against accredited agencies and approved persons.
- 96.70 Operation of the Complaint Registry.
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- 96.73 [Reserved].

**Subpart K—Adverse Action by the Accrediting Entity**

- 96.74 Scope.
- 96.75 Adverse action against accredited agencies or approved persons not in substantial compliance.
- 96.76 Procedures governing adverse action by the accrediting entity.
- 96.77 Responsibilities of the accredited agency, approved person, and accrediting entity following adverse action by the accrediting entity.
- 96.78 Accrediting entity procedures to terminate adverse action.
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- 96.80 [Reserved].

**Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary**

- 96.81 Scope.

- 96.82 The Secretary's response to actions by the accrediting entity.
- 96.83 Suspension or cancellation of accreditation or approval by the Secretary.
- 96.84 Reinstatement of accreditation or approval after suspension or cancellation by the Secretary.
- 96.85 Temporary and permanent debarment by the Secretary.
- 96.86 Length of debarment period and reapplication after temporary debarment.
- 96.87 Responsibilities of the accredited agency, approved person, and accrediting entity following suspension, cancellation, or debarment by the Secretary.
- 96.88 Review of suspension, cancellation, or debarment by the Secretary.
- 96.89 [Reserved].

**Subpart M—Dissemination and Reporting of Information by Accrediting Entities**

- 96.90 Scope.
- 96.91 Dissemination of information to the public about accreditation and approval status.
- 96.92 Dissemination of information to the public about complaints against accredited agencies and approved persons.
- 96.93 Reports to the Secretary about accredited agencies and approved persons and their activities.
- 96.94 [Reserved].

**Subpart N—Procedures and Standards Relating to Temporary Accreditation**

- 96.95 Scope.
- 96.96 Eligibility requirements for temporary accreditation.
- 96.97 Application procedures for temporary accreditation.
- 96.98 Length of temporary accreditation period.
- 96.99 Converting an application for temporary accreditation to an application for full accreditation.
- 96.100 Procedures for evaluating applicants for temporary accreditation.
- 96.101 Notification of temporary accreditation decisions.
- 96.102 Review of temporary accreditation decisions.
- 96.103 Oversight by accrediting entities.
- 96.104 Performance standards for temporary accreditation.
- 96.105 Adverse action against a temporarily accredited agency by an accrediting entity.
- 96.106 Review of the withdrawal of temporary accreditation by an accrediting entity.
- 96.107 Adverse action against a temporarily accredited agency by the Secretary.
- 96.108 Review of the withdrawal of temporary accreditation by the Secretary.
- 96.109 Effect of the withdrawal of temporary accreditation by the accrediting entity or the Secretary.
- 96.110 Dissemination and reporting of information about temporarily accredited agencies.
- 96.111 Fees charged for temporary accreditation.

**Authority:** The Convention on Protection of Children and Co-operation in Respect of

Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105-51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); The Intercountry Adoption Act of 2000, 42 U.S.C. 14901-14954.

### Subpart A—General Provisions

#### § 96.1 Purpose.

This part provides for the accreditation and approval of agencies and persons pursuant to the Intercountry Adoption Act of 2000 (Pub. L. 106-279, 42 U.S.C. 14901-14954). Subpart B of this part establishes the procedures for the selection and designation of accrediting entities to perform the accreditation and approval functions. Subparts C through H establish the general procedures and standards for accreditation and approval of agencies and persons (including renewal of accreditation or approval). Subparts I through M address the oversight of accredited or approved agencies and persons. Subpart N establishes special rules relating to small agencies that wish to seek temporary accreditation.

#### § 96.2 Definitions.

As used in this part, the term:

*Accredited agency* means an agency that has been accredited by an accrediting entity, in accordance with the standards in subpart F of this part, to provide adoption services in the United States in cases subject to the Convention. It does not include a temporarily accredited agency.

*Accrediting entity* means an entity that has been designated by the Secretary to accredit agencies (including temporarily accredit) and/or to approve persons for purposes of providing adoption services in the United States in cases subject to the Convention.

*Adoption* means the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s).

*Adoption record* means any record, information, or item related to a specific Convention adoption of a child received or maintained by an agency, person, or public domestic authority, including, but not limited to, photographs, videos, correspondence, personal effects, medical and social information, and any other information about the child. An adoption record does not include a record generated by an agency, person, or a public domestic authority to comply with the requirement to file information with the Case Registry on adoptions not subject to the Convention

pursuant to section 303(d) of the IAA (42 U.S.C. 14932(d)).

*Adoption service* means any one of the following six services:

- (1) Identifying a child for adoption and arranging an adoption;
- (2) Securing the necessary consent to termination of parental rights and to adoption;
- (3) Performing a background study on a child or a home study on a prospective adoptive parent(s), and reporting on such a study;
- (4) Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child;
- (5) Monitoring a case after a child has been placed with prospective adoptive parent(s) until final adoption; or
- (6) When necessary because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) child care or any other social service pending an alternative placement.

*Agency* means a private, nonprofit organization licensed to provide adoption services in at least one State. (For-profit entities and individuals that provide adoption services are considered "persons" as defined in this section.)

*Approved home study* means a review of the home environment of the child's prospective adoptive parent(s) that has been:

- (1) Completed by an accredited agency or temporarily accredited agency; or
- (2) Approved by an accredited agency or temporarily accredited agency.

*Approved person* means a person that has been approved, in accordance with the standards in subpart F of this part, by an accrediting entity to provide adoption services in the United States in cases subject to the Convention.

*Best interests of the child* shall have the meaning given to it by the law of the State with jurisdiction to decide whether a particular adoption or adoption-related action is in a child's best interests.

*Case Registry* means the tracking system jointly established by the Secretary and DHS to comply with section 102(e) of the IAA (42 U.S.C. 14912).

*Central Authority* means the entity designated as such under Article 6(1) of the Convention by any Convention country or, in the case of the United States, the United States Department of State.

*Central Authority function* means any duty required under the Convention to be carried out, directly or indirectly, by a Central Authority.

*Child welfare services* means services, other than those defined as "adoption services" in this section, that are designed to promote and protect the well-being of a family or child. Such services include, but are not limited to, recruiting and identifying adoptive parent(s) in cases of disruption (but not assuming custody of the child), arranging or providing temporary foster care for a child in connection with a Convention adoption or providing educational, social, cultural, medical, psychological assessment, mental health, or other health-related services for a child or family in a Convention adoption case.

*Competent authority* means a court or governmental authority of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption.

*Complaint Registry* means the system created by the Secretary pursuant to § 96.70 to receive, distribute, and monitor complaints relevant to the accreditation or approval status of agencies and persons.

*Convention* means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993.

*Convention adoption* means the adoption of a child resident in a Convention country by a United States citizen, or an adoption of a child resident in the United States by an individual or individuals residing in a Convention country, when, in connection with the adoption, the child has moved or will move between the United States and the Convention country.

*Convention country* means a country that is a party to the Convention and with which the Convention is in force for the United States.

*Country of origin* means the country in which a child is a resident and from which a child is emigrating in connection with his or her adoption.

*Debarment* means the loss of accreditation or approval by an agency or person as a result of an order of the Secretary under which the agency or person is temporarily or permanently barred from accreditation or approval.

*DHS* means the Department of Homeland Security and encompasses the former Immigration and Naturalization Service (INS) or any successor entity designated by the Secretary of Homeland Security to assume the functions vested in the Attorney General by the IAA relating to the INS's responsibilities.

*Disruption* means the interruption of a placement for adoption during the post-placement period.

*Dissolution* means the termination of the adoptive parent(s)' parental rights after an adoption.

*Exempted provider* means a social work professional or organization that performs a home study on prospective adoptive parent(s) or a child background study (or both) in the United States in connection with a Convention adoption (including any reports or updates), but that is not currently providing and has not previously provided any other adoption service in the case.

*IAA* means the Intercountry Adoption Act of 2000, Public Law 106-279 (2000) (42 U.S.C. 14901-14954), as amended from time to time.

*Legal custody* means having legal responsibility for a child under the order of a court of law, a public domestic authority, competent authority, public foreign authority, or by operation of law.

*Legal services* means services, other than those defined in this section as "adoption services," that relate to the provision of legal advice and information and to the drafting of legal instruments. Such services include, but are not limited to, drawing up contracts, powers of attorney, and other legal instruments; providing advice and counsel to adoptive parent(s) on completing DHS or Central Authority forms; and providing advice and counsel to accredited agencies, temporarily accredited agencies, approved persons, or prospective adoptive parent(s) on how to comply with the Convention, the IAA, and the regulations implementing the IAA.

*Person* means an individual or a private, for-profit entity (including a corporation, company, association, firm, partnership, society, or joint stock company) providing adoption services. It does not include public domestic authorities or public foreign authorities.

*Post-adoption* means after an adoption; in cases in which an adoption occurs in a Convention country and is followed by a re-adoption in the United States, it means after the adoption in the Convention country.

*Post-placement* means after a grant of legal custody or guardianship of the child to the prospective adoptive parent(s), or to a custodian for the purpose of escorting the child to the identified prospective adoptive parent(s), and before an adoption.

*Primary provider* means the accredited agency, temporarily accredited agency, or approved person that is identified pursuant to § 96.14 as responsible for ensuring that all six adoption services are provided and for supervising and being responsible for supervised providers where used.

*Public domestic authority* means an authority operated by a State, local, or tribal government within the United States.

*Public foreign authority* means an authority operated by a national or subnational government of a Convention country.

*Secretary* means the Secretary of State, the Assistant Secretary of State for Consular Affairs, or any other Department of State official exercising the Secretary of State's authority under the Convention, the IAA, or any regulations implementing the IAA, pursuant to a delegation of authority.

*State* means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands.

*Supervised provider* means any agency, person, or other non-governmental entity, including any foreign entity, regardless of whether it is called a facilitator, agent, attorney, or by any other name, that is providing one or more adoption services in a Convention case under the supervision and responsibility of an accredited agency, temporarily accredited agency, or approved person that is acting as the primary provider in the case.

*Temporarily accredited agency* means an agency that has been accredited on a temporary basis by an accrediting entity, in accordance with the standards in subpart N of this part, to provide adoption services in the United States in cases subject to the Convention. It does not include an accredited agency.

### § 96.3 [Reserved].

### Subpart B—Selection, Designation, and Duties of Accrediting Entities

#### § 96.4 Designation of accrediting entities by the Secretary.

(a) The Secretary, in the Secretary's discretion, will designate one or more entities that meet the criteria set forth in § 96.5 to perform the accreditation (including temporary accreditation) and/or approval functions. Each accrediting entity's designation will be set forth in an agreement between the Secretary and the accrediting entity. The agreement will govern the accrediting entity's operations. The agreements will be published in the **Federal Register**.

(b) The Secretary's designation may authorize an accrediting entity to accredit (including temporarily accredit) agencies, to approve persons, or to both accredit agencies and approve persons. The designation may also limit the accrediting entity's geographic

jurisdiction or impose other limits on the entity's jurisdiction.

(c) A public entity may only be designated to accredit agencies and approve persons that are located in the public entity's State.

#### § 96.5 Requirement that accrediting entity be a nonprofit or public entity.

An accrediting entity must qualify as either:

(a) An organization described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended, that has expertise in developing and administering standards for entities providing child welfare services; or

(b) A public entity (other than a Federal entity), including, but not limited to, any State or local government or governmental unit or any political subdivision, agency, or instrumentality thereof, that is responsible for licensing adoption agencies in a State and that has expertise in developing and administering standards for entities providing child welfare services.

#### § 96.6 Performance criteria for designation as an accrediting entity.

An entity that seeks to be designated as an accrediting entity must demonstrate to the Secretary:

(a) That it has a governing structure, the human and financial resources, and systems of control adequate to ensure its reliability;

(b) That it is capable of performing the accreditation or approval functions or both on a timely basis and of administering any renewal cycle authorized under § 96.60;

(c) That it can monitor the performance of agencies it has accredited or temporarily accredited and persons it has approved (including their use of any supervised providers) to ensure their continued compliance with the Convention, the IAA, and the regulations implementing the IAA;

(d) That it has the capacity to take appropriate adverse actions against agencies it has accredited or temporarily accredited and persons it has approved;

(e) That it can perform the required data collection, reporting, and other similar functions;

(f) Except in the case of a public entity, that it operates independently of any agency or person that provides adoption services, and of any membership organization that includes agencies or persons that provide adoption services;

(g) That it has the capacity to conduct its accreditation, temporary accreditation, and approval functions fairly and impartially;



(h) That it can comply with any conflict-of-interest prohibitions set by the Secretary in its agreement;

(i) That it prohibits conflicts of interest with agencies or persons or with any membership organization that includes agencies or persons that provide adoption services; and

(j) That it prohibits its employees or other individuals acting as site evaluators, including, but not limited to, volunteer site evaluators, from becoming employees or supervised providers of an agency or person for at least one year after they have evaluated such agency or person for accreditation, temporary accreditation, or approval.

**§ 96.7 Authorities and responsibilities of an accrediting entity.**

(a) An accrediting entity may be authorized by the Secretary to perform some or all of the following functions:

(1) Determining whether agencies are eligible for accreditation and/or temporary accreditation;

(2) Determining whether persons are eligible for approval;

(3) Overseeing accredited agencies, temporarily accredited agencies, and/or approved persons by monitoring their compliance with applicable requirements;

(4) Investigating and responding to complaints about accredited agencies, temporarily accredited agencies, and approved persons (including their use of supervised providers);

(5) Taking adverse action against an accredited agency, temporarily accredited agency, or approved person, and/or referring an accredited agency, temporarily accredited agency, or approved person for possible action by the Secretary;

(6) Determining whether accredited agencies and approved persons are eligible for renewal of their accreditation or approval on a cycle consistent with § 96.60;

(7) Collecting data from accredited agencies, temporarily accredited agencies, and approved persons, maintaining records, and reporting information to the Secretary, State courts, and other entities; and

(8) Assisting the Secretary in taking appropriate action to help an agency or person in transferring its Convention cases and adoption records.

(b) The Secretary may require the accrediting entity:

(1) To utilize the Complaint Registry as provided in subpart J of this part; and

(2) To fund a portion of the costs of operating the Complaint Registry with fees collected by the accrediting entity pursuant to the schedule of fees approved by the Secretary as provided in § 96.8.

(c) An accrediting entity must perform all responsibilities in accordance with the Convention, the IAA, the regulations implementing the IAA, and its agreement with the Secretary.

**§ 96.8 Fees charged by accrediting entities.**

(a) An accrediting entity may charge fees for accreditation or approval services under this part only in accordance with a schedule of fees approved by the Secretary. Before approving a schedule of fees proposed by an accrediting entity, or subsequent proposed changes to an approved schedule, the Secretary will require the accrediting entity to demonstrate:

(1) That its proposed schedule of fees reflects appropriate consideration of the relative size and geographic location and volume of Convention cases of the agencies or persons it expects to serve;

(2) That the total fees the accrediting entity expects to collect under the schedule of fees will not exceed the full costs of accreditation or approval under this part (including, but not limited to, costs for completing the accreditation or approval process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities).

(b) The schedule of fees must:

(1) Establish separate non-refundable fees for Convention accreditation and Convention approval;

(2) Include in each fee for full Convention accreditation or approval the costs of all activities associated with the accreditation or approval cycle, including but not limited to, costs for completing the accreditation or approval process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities, except that separate fees based on actual costs incurred may be charged for the travel and maintenance of evaluators; and

(3) If the accrediting entity provides temporary accreditation services, include fees as required by § 96.111 for agencies seeking temporary accreditation under subpart N of this part.

(c) An accrediting entity must make its approved schedule of fees available to the public, including prospective applicants for accreditation or approval, upon request. At the time of application, the accrediting entity must specify the fees to be charged to the applicant in a contract between the parties and must provide notice to the applicant that no portion of the fee will be refunded if the applicant fails to become accredited or approved.

(d) Nothing in this section shall be construed to provide a private right of action to challenge any fee charged by an accrediting entity pursuant to a schedule of fees approved by the Secretary.

**§ 96.9 Agreement between the Secretary and the accrediting entity.**

An accrediting entity must perform its functions pursuant to a written agreement with the Secretary that will be published in the **Federal Register**. The agreement will address:

(a) The responsibilities and duties of the accrediting entity;

(b) The method by which the costs of delivering the accreditation, temporary accreditation, or approval services may be recovered through the collection of fees from those seeking accreditation, temporary accreditation, or approval, and how the entity's schedule of fees will be approved;

(c) How the accrediting entity will address complaints about accredited agencies, temporarily accredited agencies, and approved persons (including their use of supervised providers) and complaints about the accrediting entity itself;

(d) Data collection requirements;

(e) Matters of communication and accountability between both the accrediting entity and the applicant(s) and between the accrediting entity and the Secretary; and

(f) Other matters upon which the parties have agreed.

**§ 96.10 Suspension or cancellation of the designation of an accrediting entity by the Secretary.**

(a) The Secretary will suspend or cancel the designation of an accrediting entity if the Secretary concludes that it is substantially out of compliance with the Convention, the IAA, the regulations implementing the IAA, other applicable laws, or the agreement with the Secretary. Complaints regarding the performance of the accrediting entity may be submitted to the Department of State, Bureau of Consular Affairs. The Secretary will consider complaints in determining whether an accrediting entity's designation should be suspended or canceled.

(b) The Secretary will notify an accrediting entity in writing of any deficiencies in the accrediting entity's performance that could lead to the suspension or cancellation of its designation, and will provide the accrediting entity with an opportunity to demonstrate that suspension or cancellation is unwarranted, in accordance with procedures established in the agreement entered into pursuant to § 96.9.

(c) An accrediting entity may be considered substantially out of compliance under circumstances that include, but are not limited to:

(1) Failing to act in a timely manner when presented with evidence that an accredited agency or approved person is substantially out of compliance with the standards in subpart F of this part or a temporarily accredited agency is substantially out of compliance with the standards in § 96.104;

(2) Accrediting or approving significant numbers of agencies or persons whose performance results in intervention of the Secretary for the purpose of suspension, cancellation, or debarment;

(3) Failing to perform its responsibilities fairly and objectively;

(4) Violating prohibitions on conflicts of interest;

(5) Failing to meet its reporting requirements;

(6) Failing to protect information or documents that it receives in the course of performing its responsibilities; and

(7) Failing to monitor frequently and carefully the compliance of accredited agencies, temporarily accredited agencies, and approved persons with the home study requirements of the Convention, section 203(b)(1)(A)(ii) of the IAA (42 U.S.C. 14923(b)(1)(A)(ii)), and § 96.47.

(d) An accrediting entity that is subject to a final action of suspension or cancellation may petition the United States District Court for the District of Columbia or the United States district court in the judicial district in which the accrediting entity is located to set aside the action as provided in section 204(d) of the IAA (42 U.S.C. 14924(d)).

#### § 96.11 [Reserved].

### Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services

#### § 96.12 Authorized adoption service providers.

(a) Once the Convention has entered into force for the United States, except as provided in section 505(b) of the IAA (relating to transitional cases), an agency or person may not offer, provide, or facilitate the provision of any adoption service in the United States in connection with a Convention adoption unless it is:

(1) An accredited agency, a temporarily accredited agency, or an approved person;

(2) A supervised provider; or

(3) An exempted provider, if the exempted provider's home study or child background study will be reviewed and approved by an accredited

agency or temporarily accredited agency pursuant to § 96.47(c) or 96.53(b).

(b) A public domestic authority may also offer, provide, or facilitate the provision of any such adoption service.

(c) Neither conferral nor maintenance of accreditation, temporary accreditation, or approval, nor status as an exempted or supervised provider, nor status as a public domestic authority shall be construed to imply, warrant, or establish that, in any specific case, an adoption service has been provided consistently with the Convention, the IAA, or the regulations implementing the IAA. Conferral and maintenance of accreditation, temporary accreditation, or approval under this part establishes only that the accrediting entity has concluded, in accordance with the standards and procedures of this part, that the agency or person conducts adoption services in substantial compliance with the applicable standards set forth in this part; it is not a guarantee that in any specific case the accredited agency, temporarily accredited agency, or approved person is providing adoption services consistently with the Convention, the IAA, the regulations implementing the IAA, or any other applicable law, whether Federal, State, or foreign. Neither the Secretary nor any accrediting entity shall be responsible for any acts of an accredited agency, temporarily accredited agency, approved person, exempted provider, supervised provider, or other entity providing services in connection with a Convention adoption.

#### § 96.13 Circumstances in which accreditation, approval, or supervision is not required.

(a) *Home studies and child background studies.* Home studies and child background studies, when performed by exempted providers, may be performed without accreditation, temporary accreditation, approval, or supervision; provided, however, that an exempted provider's home study must be approved by an accredited agency or temporarily accredited agency in accordance with § 96.47(c), and an exempted provider's child background study must be approved by an accredited agency or temporarily accredited agency in accordance with § 96.53(b).

(b) *Child welfare services.* An agency or person does not need to be accredited, temporarily accredited, approved, or operate as a supervised provider if it is providing only child welfare services, and not providing any adoption services, in connection with a Convention adoption. If the agency or

person provides both a child welfare service and any adoption service in the United States in a Convention adoption case, it must be accredited, temporarily accredited, or approved or operate as a supervised provider unless the only adoption service provided is preparation of a home study and/or a child background study.

(c) *Legal services.* An agency or person does not need to be accredited, temporarily accredited, approved, or to operate as a supervised provider if it is providing only legal services, and not providing any adoption services, in connection with a Convention adoption. If the agency or person provides both a legal service and any adoption service in the United States in a Convention adoption case, it must be accredited, temporarily accredited, or approved or operate as a supervised provider unless the only adoption service provided is preparation of a home study and/or a child background study. Nothing in this part shall be construed:

(1) To permit an attorney to provide both legal services and adoption services in an adoption case where doing so is prohibited by State law; or

(2) To require any attorney who is providing one or more adoption services as part of his or her employment by a public domestic authority to be accredited or approved or operate as a supervised provider.

(d) *Prospective adoptive parent(s) acting on own behalf.* Prospective adoptive parent(s) may act on their own behalf without being accredited, temporarily accredited, or approved unless so acting is prohibited by State law or the law of the Convention country. In the case of a child immigrating to the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State in which the prospective adoptive parent(s) reside and the laws of the Convention country from which the parent(s) seek to adopt. In the case of a child emigrating from the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State where the child resides and the laws of the Convention country in which the parent(s) reside.

#### § 96.14 Providing adoption services using other providers.

(a) Accreditation, temporary accreditation, and approval under this part require that, in each Convention adoption case, an accredited agency, a temporarily accredited agency, or an approved person will be identified and act as the primary provider. If one accredited agency, temporarily

accredited agency, or approved person is providing all adoption services by itself, it must act as the primary provider. If just one accredited agency, temporarily accredited agency, or approved person is involved in providing adoption services, the sole accredited agency, temporarily accredited agency, or approved person must act as the primary provider. If adoption services in the Convention case are being provided by more than one accredited agency, temporarily accredited agency, or approved person, the agency or person that has child placement responsibility, as evidenced by the following, must act as the primary provider throughout the case:

- (1) Entering into placement contracts with prospective adoptive parent(s) to provide child referral and placement;
- (2) Accepting custody from a birth parent or other legal custodian in a Convention country for the purpose of placement for adoption;
- (3) Assuming responsibility for liaison with a Convention country's Central Authority or its designees with regard to arranging an adoption; or
- (4) Receiving from or sending to a Convention country information about a child that is under consideration for adoption, unless acting as a local service provider that conveys such information to parent(s) on behalf of the primary provider.

(b) Pursuant to § 96.44, in the case of accredited agencies or approved persons, and § 96.104(g), in the case of temporarily accredited agencies, the primary provider may only use the following to provide adoption services in the United States:

- (1) A supervised provider, including an accredited agency, temporarily accredited agency, or approved person;
- (2) An exempted provider, if the exempted provider's home study or child background study will be reviewed and approved by an accredited agency or temporarily accredited agency pursuant to § 96.47(c) or § 96.53(b); or
- (3) A public domestic authority.

(c) Pursuant to § 96.44 of subpart F, in the case of accredited agencies or approved persons, and § 96.104(g) of subpart N, in the case of temporarily accredited agencies, the primary provider may only use the following to provide adoption services in a Convention country:

- (1) A Central Authority, competent authority, or a public foreign authority;
- (2) A foreign supervised provider, including a provider accredited by the Convention country; or
- (3) A foreign provider (agency, person, or other non-governmental entity) who

(i) Has secured or is securing the necessary consent to termination of parental rights and to adoption, if the primary provider verifies consent pursuant to § 96.46(c); or

(ii) Has prepared or is preparing a background study on a child in a case involving immigration to the United States (incoming case) or a home study on prospective adoptive parent(s) in a case involving emigration from the United States (outgoing case), and a report on the results of such a study, if the primary provider verifies the study and report pursuant to § 96.46(c).

(d) The primary provider is not required to provide supervision or to assume responsibility for:

- (1) Public domestic authorities; or
- (2) Central Authorities, competent authorities, and public foreign authorities.

(e) The primary provider must adhere to the standards contained in § 96.45 (Using supervised providers in the United States) when using supervised providers in the United States and the applicable standards contained in § 96.46 (Using providers in Convention countries) when using providers outside the United States.

#### § 96.15 Examples.

The following examples illustrate the rules of §§ 96.12 to 96.14:

*Example 1.* Identifying a child for adoption and arranging an adoption. Agency X identifies children eligible for adoption in the United States on a TV program in an effort to recruit prospective adoptive parent(s). A couple in a Convention country calls Agency X about one of the children. Agency X refers them to an agency or person in the United States who arranges intercountry adoptions. Agency X does not require accreditation, temporarily accreditation, approval or supervision because it is not both identifying and arranging the adoption. In contrast, Agency Y, located in the United States, provides information about children eligible for adoption in a Convention country on a website and then arranges for interested U.S. parents to adopt those children. Agency Y must be accredited, temporarily accredited, approved, or supervised because, in addition to identifying children eligible for adoption, it is also helping to arrange the adoption.

*Example 2.* Child welfare services exemption. Doctor X evaluates the medical records and a video of Child Y. The evaluation will be used in a Convention adoption as part of the placement of Child Y and is the only service that Doctor X provides in the United States with regard to Child Y's adoption. Doctor X (not employed with an accredited agency or approved person) does not need to be approved or supervised because she is not providing an adoption service as defined in § 96.2.

*Example 3.* Home study exemption. Social Worker X, in the United States, (not

employed with an accredited agency or approved person) interviews Prospective Adoptive Parent Y, obtains a criminal background study, and checks the references of Prospective Adoptive Parent Y, then composes a report and submits the report to an accredited agency for use in a Convention adoption. Social Worker X does not provide any other services to Prospective Adoptive Parent Y. Social Worker X qualifies as an exempted provider and therefore need not be approved or operate as supervised provider. In contrast, Social Worker Z, in the United States, (not employed with an accredited agency or approved person) prepares a home study report for Prospective Adoptive Parent(s) W, and in addition re-enters the house after Child V has been placed with Prospective Adoptive Parent(s) W to assess how V and W are adjusting to life as a family. This assessment is post-placement monitoring, which is an adoption service. Therefore, Social Worker Z would need to become approved before providing this assessment for this Convention adoption or else operate as a supervised provider. If an agency or person provides an adoption service in addition to a home study or child background study, the agency or person needs to become accredited, temporarily accredited, approved, or supervised before providing that adoption service.

*Example 4.* Child background study exemption. An employee of Agency X interviews Child Y in the United States and compiles a report concerning Child Y's social and developmental history for use in a Convention adoption. Agency X provides no other adoption services on behalf of Child Y. Agency X does not need to be accredited, temporarily accredited, approved, or supervised. Agency X is only conducting and creating a child background study, and therefore is an exempted provider. In contrast, an employee of Agency Z interviews Child W in the United States and creates a child background study for use in a Convention adoption. Agency Z subsequently identifies prospective adoptive parent(s) and arranges a new adoption when Child W's previous adoption becomes disrupted. Agency Z needs to be accredited, temporarily accredited, approved, or supervised before providing this service. If an agency or person provides an adoption service in addition to a child background study or home study, the agency or person needs to be accredited, temporarily accredited, approved, or supervised before providing the additional service.

*Example 5.* Home study and child welfare services exemptions. Agency X interviews Prospective Adoptive Parent Y, obtains a criminal background check, checks the references of Prospective Adoptive Parent Y, then composes a home study and submits it to an accredited agency for use in a Convention adoption in the United States. Parent Y later joins a post-adoption support group for adoptive parents sponsored by Agency X. If Agency X performs no other adoption services, Agency X does not need to be accredited, temporarily accredited, approved, or supervised. If an agency or person provides a home study or child background study as well as other services in

the United States that do not require accreditation, temporary accreditation, approval, or supervision, and no other adoption services, the agency or person is an exempted provider.

*Example 6.* Exempted provider. Agency X interviews Prospective Adoptive Parent(s) Y, obtains a criminal background check, checks the references of Prospective Adoptive Parent(s) Y, and then composes a home study and submits the report to an accredited agency. In addition, Agency X interviews Child Z and compiles a report concerning Child Z's social and developmental history. All of Agency X's work is done in the United States. Both reports will be used in a Convention adoption. If Agency X performs no other adoption services, Agency X does not need to be accredited, temporarily accredited, approved, or supervised. If an agency or person provides a home study and child background study as well as other services that do not require accreditation, temporary accreditation, approval or supervision, and no other adoption services, the agency or person is an exempted provider.

*Example 7.* Legal services exemption. Attorney X (not employed with an accredited agency or approved person) provides advice and counsel to Prospective Adoptive Parent(s) Y on filling out DHS paperwork required for a Convention adoption. Among other papers, Attorney X prepares an affidavit of consent to termination of parental rights and to adoption of Child W to be signed by the birth mother in the United States. Attorney X must be approved or supervised because securing consent to termination of parental rights is an adoption service. In contrast, Attorney Z (not employed with an accredited agency or approved person) assists Adoptive Parent(s) T to complete an adoption in the State in which they reside, after they have been granted an adoption in Child V's Convention country of origin. Attorney Z is exempt from approval or supervision because she is providing legal services, but no adoption services.

*Example 8.* Post-placement monitoring. A court in a Convention country has granted custody of Child W to Prospective Adoptive Parent(s) Y pending the completion of W's adoption. Agency X interviews both Prospective Adoptive Parent(s) Y and Child W in their home in the United States. Agency X gathers information on the adjustment of Child W as a member of the family and inquires into the social and educational progress of Child W. Agency X must be accredited, temporarily accredited, approved, or supervised. Agency X's activities constitute post-placement monitoring, which is an adoption service. In contrast, if Person Z provided counseling for Prospective Adoptive Parent(s) Y and/or Child W, but provided no adoption services in the United States to the family, Person Z would not need to be approved or supervised. Post-placement counseling is different than post-placement monitoring because it does not relate to evaluating the adoption placement. Post-placement counseling is not an adoption service and does not trigger the accreditation/approval requirements of the IAA and this part.

*Example 9.* Post-adoption services. Convention Country H requires that post-adoption reports be completed and sent to its Central Authority every year until adopted children reach the age of 18. Agency X provides support groups and a newsletter for U.S. parents that have adopted children from Country H and encourages parents to complete their post-adoption reports annually. Agency X does not need to be accredited, temporarily accredited, approved, or supervised because it is providing only post-adoption services. Post-adoption services are not included in the definition of adoption services, and therefore, do not trigger accreditation/approval requirements of the IAA and this part.

*Example 10.* Assuming custody and providing services after a disruption. Agency X provides counseling for Prospective Adoptive Parent(s) Y and for Child W pending the completion of Child W's Convention adoption. The adoption is eventually disrupted. Agency X helps recruit and identify new prospective adoptive parent(s) for Child W, but it is Agency P that assumes custody of Child W and places him in foster care until an alternative adoptive placement can be found. Agency X is not required to be accredited, temporarily accredited, approved, or supervised because it is not providing an adoption service in the United States as defined in § 96.2. Agency P, on the other hand, is providing an adoption service and would have to be accredited, temporarily accredited, approved, or supervised.

*Example 11.* Making non-judicial determinations of best interest of child and appropriateness of adoptive placement of child. Agency X receives information about and a videotape of Child W from the institution where Child W lives in a Convention country. Based on the age, sex, and health problems of Child W, Agency X matches Prospective Adoptive Parent(s) Y with Child W. Prospective Adoptive Parent(s) Y receive a referral from Agency X and agree to accept the referral and proceed with the adoption of Child W. Agency X determines that Prospective Adoptive Parent(s) Y are a good placement for Child W and notifies the competent authority in W's country of origin that it has found a match for Child W and will start preparing adoption paperwork. All of Agency X's services are provided in the United States. Agency X is performing an adoption service and must be accredited, temporarily accredited, approved, or supervised.

*Example 12.* Securing necessary consent to termination of parental rights and to adoption. Facilitator Y is accredited by Convention Country Z. He has contacts at several orphanages in Convention Country Z and helps Agency X match children eligible for adoption with prospective adoptive parent(s) in the United States. Facilitator Y works with the institution that is the legal guardian of Child W in order to get the documents showing the institution's legal consent to the adoption of Child W. Agency X is the only U.S. agency providing adoption services in the case. Agency X must be accredited, temporarily accredited, or approved and must either treat Facilitator Y

as a foreign supervised provider in accordance with § 96.46(a) and (b) or verify the consents Facilitator Y secured, in accordance with § 96.46(c).

#### **§ 96.16 Public domestic authorities.**

Public domestic authorities are not required to become accredited to be able to provide adoption services in Convention adoption cases, but must comply with the Convention, the IAA, and other applicable law when providing services in a Convention adoption case.

#### **§ 96.17 Effective date of accreditation and approval requirements.**

The Secretary will publish a document in the **Federal Register** announcing the date on which the Convention will enter into force for the United States. As of that date, the regulations in subpart C of this part will govern Convention adoptions between the United States and Convention countries, and agencies or persons providing adoption services must comply with § 96.12 and applicable Federal regulations. The Secretary will maintain for the public a current listing of Convention countries.

#### **Subpart D—Application Procedures for Accreditation and Approval**

##### **§ 96.18 Scope.**

(a) Agencies are eligible to apply for “accreditation” or “temporary accreditation.” Persons are eligible to apply for “approval.” Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N, the provisions of this subpart do not apply to agencies seeking temporary accreditation. Applications for full accreditation rather than temporary accreditation will be processed in accordance with § 96.20 and § 96.21.

(b) An agency or person seeking to be accredited or approved as of the time the Convention enters into force for the United States, and to be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law, must follow the special provision contained in § 96.19.

(c) If an agency or person is reapplying for accreditation or approval following cancellation of its accreditation or approval by an accrediting entity or refusal by an accrediting entity to renew its accreditation or approval, it must comply with the procedures in § 96.78.

(d) If an agency or person that has been accredited or approved is seeking

renewal, it must comply with the procedures in § 96.63.

**§ 96.19 Special provision for agencies and persons seeking to be accredited or approved as of the time the Convention enters into force for the United States.**

(a) The Secretary will establish and announce, by public notice in the **Federal Register**, a transitional application deadline. An agency or person seeking to be accredited or approved as of the time the Convention enters into force for the United States must submit an application to an accrediting entity with jurisdiction to evaluate its application, with the required fee(s), by the transitional application deadline. The Secretary will subsequently establish and announce a date by which such agencies and persons must complete the accreditation or approval process in time to be accredited or approved at the time the Convention enters into force for the United States (deadline for initial accreditation or approval).

(b) The accrediting entity must use its best efforts to provide a reasonable opportunity for an agency or person that applies by the transitional application deadline to complete the accreditation or approval process by the deadline for initial accreditation or approval. Only those agencies and persons that are accredited or approved by the deadline for initial accreditation or approval will be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law.

(c) The accrediting entity may, in its discretion, permit an agency or person that fails to submit an application by the transitional application deadline to attempt to complete the accreditation or approval process in time to be included on the initial list; however, such an agency or person is not assured an opportunity to complete the accreditation or approval process in time to be included on the initial list. The accrediting entity must give priority to applicants that filed by the transitional application deadline. If such an agency or person succeeds in completing the accreditation or approval process in time to be included on the initial list, it will be treated as an agency or person that applied by the transitional application deadline for the purposes of § 96.58 and § 96.60(b).

**§ 96.20 First-time application procedures for accreditation and approval.**

(a) Agencies or persons seeking accreditation or approval for the first

time may submit an application at any time, with the required fee(s), to an accrediting entity with jurisdiction to evaluate the application. If an agency or person seeks to be accredited or approved by the deadline for initial accreditation or approval, an agency or person must comply with the procedures in § 96.19.

(b) The accrediting entity must establish and follow uniform application procedures and must make information about those procedures available to agencies and persons that are considering whether to apply for accreditation or approval. An accrediting entity must evaluate the applicant for accreditation or approval in a timely fashion.

**§ 96.21 Choosing an accrediting entity.**

(a) An agency that seeks to become accredited must apply to an accrediting entity that is designated to provide accreditation services and that has jurisdiction over its application. A person that seeks to become approved must apply to an accrediting entity that is designated to provide approval services and that has jurisdiction over its application. The agency or person may apply to only one accrediting entity at a time.

(b)(1) If the agency or person is applying for accreditation or approval pursuant to this part for the first time, it may apply to any accrediting entity with jurisdiction over its application. However, the agency or person must apply to the same accrediting entity that handled its prior application when it next applies for accreditation or approval, if the agency or person:

- (i) Has been denied accreditation or approval;
- (ii) Has withdrawn its application in anticipation of denial;
- (iii) Has had its accreditation or approval cancelled by an accrediting entity or the Secretary;
- (iv) Has been temporarily debarred by the Secretary; or
- (v) Has been refused renewal of its accreditation or approval by an accrediting entity.

(2) If the prior accrediting entity is no longer providing accreditation or approval services, the agency or person may apply to any accrediting entity with jurisdiction over its application.

**§ 96.22 [Reserved]**

**Subpart E—Evaluation of Applicants for Accreditation and Approval**

**§ 96.23 Scope.**

The provisions in this subpart govern the evaluation of agencies and persons for accreditation or approval.

Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N, the provisions of this subpart do not apply to agencies seeking temporary accreditation.

**§ 96.24 Procedures for evaluating applicants for accreditation or approval.**

(a) The accrediting entity must designate at least two evaluators to evaluate an agency or person for accreditation or approval. The accrediting entity's evaluators must have expertise in intercountry adoption, standards evaluation, or experience with the management or oversight of child welfare organizations and must also meet any additional qualifications required by the Secretary in the agreement with the accrediting entity.

(b) To evaluate the agency's or person's eligibility for accreditation or approval, the accrediting entity must:

- (1) Review the agency's or person's written application and supporting documentation;
- (2) Verify the information provided by the agency or person by examining underlying documentation;
- (3) Consider any complaints received by the accrediting entity pursuant to subpart J of this part; and
- (4) Conduct site visit(s).

(c) The site visit(s) may include, but need not be limited to, interviews with birth parents, adoptive parent(s), prospective adoptive parent(s), and adult adoptee(s) served by the agency or person, interviews with the agency's or person's employees, and interviews with other individuals knowledgeable about the agency's or person's provision of adoption services. It may also include a review of on-site documents. The accrediting entity must, to the extent practicable, advise the agency or person in advance of the type of documents it wishes to review during the site visit. The accrediting entity must require at least one of the evaluators to participate in each site visit. The accrediting entity must determine the number of evaluators that participate in a site visit in light of factors such as:

- (1) The agency's or person's size;
- (2) The number of adoption cases it handles;
- (3) The number of sites the accrediting entity decides to visit; and
- (4) The number of individuals working at each site.

(d) Before deciding whether to accredit an agency or approve a person, the accrediting entity may, in its discretion, advise the agency or person of any deficiencies that may hinder or prevent its accreditation or approval and defer a decision to allow the agency or person to correct the deficiencies.

**§ 96.25 Access to information and documents requested by the accrediting entity.**

(a) The agency or person must give the accrediting entity access to information and documents, including adoption case files and proprietary information, that it requires or requests to evaluate an agency or person for accreditation or approval and to perform its oversight, enforcement, renewal, data collection, and other functions. The agency or person must also cooperate with the accrediting entity by making employees available for interviews upon request.

(b) Accrediting entity review of adoption case files pursuant to paragraph (a) shall be limited to Convention adoption case files, except that, in the case of first-time applicants for accreditation or approval, the accrediting entity may review adoption case files related to non-Convention cases for purposes of assessing the agency's or person's capacity to comply with record-keeping and data-management standards in subpart F of this part. The accrediting entity shall permit the agency or person to redact names and other information that identifies birth parent(s), prospective adoptive parent(s), and adoptee(s) from such non-Convention adoption case files prior to their inspection by the accrediting entity.

(c) If an agency or person fails to provide requested documents or information, or to make employees available as requested, the accrediting entity may deny accreditation or approval or, in the case of an accredited agency, temporarily accredited agency, or approved person, take appropriate adverse action against the agency or person solely on that basis.

**§ 96.26 Protection of information and documents by the accrediting entity.**

(a) The accrediting entity must protect from unauthorized use and disclosure all documents and information about the agency or person it receives including, but not limited to, documents and proprietary information about the agency's or person's finances, management, and professional practices received in connection with the performance of its accreditation or approval, oversight, enforcement, renewal, data collection, or other functions under its agreement with the Secretary and this part.

(b) The documents and information received may not be disclosed to the public and may be used only for the purpose of performing the accrediting entity's accreditation or approval functions and related tasks under its

agreement with Secretary and this part, or to provide information to the Secretary, the Complaint Registry, or an appropriate Federal, State, or local authority, including, but not limited to, a public domestic authority or local law enforcement authority unless:

- (1) Otherwise authorized by the agency or person in writing;
- (2) Otherwise required under Federal or State laws; or
- (3) Required pursuant to subpart M of this part.

(c) Unless the names and other information that identifies the birth parent(s), prospective adoptive parent(s), and adoptee(s) are requested by the accrediting entity for an articulated reason, the agency or person may withhold from the accrediting entity such information and substitute individually assigned codes in the documents it provides. The accrediting entity must have appropriate safeguards to protect from unauthorized use and disclosure of any information in its files that identifies birth parent(s), prospective adoptive parent(s), and adoptee(s). The accrediting entity must ensure that its officers, employees, contractors, and evaluators who have access to information or documents provided by the agency or person have signed a non-disclosure agreement reflecting the requirements of § 96.26(a) and (b). The accrediting entity must maintain an accurate record of the agency's or person's application, the supporting documentation, and the basis for its decision.

**§ 96.27 Substantive criteria for evaluating applicants for accreditation or approval.**

(a) The accrediting entity may not grant an agency accreditation or a person approval, or permit an agency's or person's accreditation or approval to be maintained, unless the agency or person demonstrates to the satisfaction of the accrediting entity that it is in substantial compliance with the standards in subpart F of this part.

(b) When the agency or person makes its initial application for accreditation or approval under the standards contained in subpart F of this part, the accrediting entity may measure the capacity of the agency or person to achieve substantial compliance with these standards where relevant evidence of its actual performance is not yet available. Once the agency or person has been accredited or approved pursuant to this part, the accrediting entity must, for the purposes of monitoring, renewal, enforcement, and reapplication after adverse action, consider the agency's or person's actual performance in deciding whether the agency or person is in

substantial compliance with the standards contained in subpart F of this part, unless the accrediting entity determines that it is still necessary to measure capacity because adequate evidence of actual performance is not available.

(c) The standards contained in subpart F of this part apply during all the stages of accreditation and approval, including, but not limited to, when the accrediting entity is evaluating an applicant for accreditation or approval, when it is determining whether to renew an agency's or person's accreditation or approval, when it is monitoring the performance of an accredited agency or approved person, and when it is taking adverse action against an accredited agency or approved person. Except as provided in § 96.25 and paragraphs (e) and (f) of this section, the accrediting entity may only use the standards contained in subpart F of this part when determining whether an agency or person may be granted or permitted to maintain Convention accreditation or approval.

(d) The Secretary will ensure that each accrediting entity performs its accreditation and approval functions using only a method approved by the Secretary that is substantially the same as the method approved for use by each other accrediting entity. Each such method will include: an assigned value for each standard (or element of a standard); a method of rating an agency's or person's compliance with each applicable standard; and a method of evaluating whether an agency's or person's overall compliance with all applicable standards establishes that the agency or person is in substantial compliance with the standards and can be accredited, temporarily accredited, or approved. The Secretary will ensure that the value assigned to each standard reflects the relative importance of that standard to compliance with the Convention and the IAA and is consistent with the value assigned to the standard by other accrediting entities. The accrediting entity must advise applicants of the value assigned to each standard (or elements of each standard) at the time it provides applicants with the application materials.

(e) If an agency or person has previously been denied accreditation or approval, has withdrawn its application in anticipation of denial, has had its temporary accreditation withdrawn, or is reapplying for accreditation or approval after cancellation, refusal to renew, or temporary debarment, the accrediting entity may take the reasons underlying such actions into account when evaluating the agency or person

for accreditation or approval, and may deny accreditation or approval on the basis of the previous action.

(f) If an agency or person that has an ownership or control interest in the applicant, as that term is defined in section 1124 of the Social Security Act (42 U.S.C. 1320a-3), has been debarred pursuant to § 96.85, the accrediting entity may take into account the reasons underlying the debarment when evaluating the agency or person for accreditation or approval, and may deny accreditation or approval or refuse to renew accreditation or approval on the basis of the debarment.

(g) The standards contained in subpart F of this part do not eliminate the need for an agency or person to comply fully with the laws of the jurisdictions in which it operates. An agency or person must provide adoption services in Convention cases consistent with the laws of any State in which it operates and with the Convention and the IAA. Persons that are approved to provide adoption services may only provide such services in States that do not prohibit persons from providing adoption services. Nothing in the application of subparts E and F should be construed to require a State to allow persons to provide adoption services if State law does not permit them to do so.

#### § 96.28 [Reserved]

### Subpart F—Standards for Convention Accreditation and Approval

#### § 96.29 Scope.

The provisions in this subpart provide the standards for accrediting agencies and approving persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to agencies seeking temporary accreditation.

### Licensing and Corporate Governance

#### § 96.30 State licensing.

(a) The agency or person is properly licensed or otherwise authorized by State law to provide adoption services in at least one State.

(b) The agency or person follows applicable State licensing and regulatory requirements in all jurisdictions in which it provides adoption services.

(c) If it provides adoption services in a State in which it is not itself licensed or authorized to provide such services, the agency or person does so only:

(1) Through agencies or persons that are licensed or authorized by State law to provide adoption services in that

State and that are exempted providers or acting as supervised providers; or

(2) Through public domestic authorities.

(d) In the case of a person, the individual or for-profit entity is not prohibited by State law from providing adoption services in any State where it is providing adoption services, and does not provide adoption services in Convention countries that prohibit individuals or for-profit entities from providing adoption services.

#### § 96.31 Corporate structure.

(a) The agency qualifies for nonprofit tax treatment under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or for nonprofit status under the laws of any State.

(b) The person is an individual or is a for-profit entity organized as a corporation, company, association, firm, partnership, society, or joint stock company, or other legal entity under the laws of any State.

#### § 96.32 Internal structure and oversight.

(a) The agency or person has (or, in the case of an individual, is) a chief executive officer or equivalent official who is qualified by education, adoption service experience, and management credentials to ensure effective use of resources and coordinated delivery of the services provided by the agency or person, and has authority and responsibility for management and oversight of the staff and any supervised providers in carrying out the adoption-related functions of the organization.

(b) The agency or person has a board of directors or a similar governing body that establishes and approves its mission, policies, budget, and programs; provides leadership to secure the resources needed to support its programs; includes one or more individuals with experience in adoption, including but not limited to, adoptees, birth parents, prospective adoptive parent(s), and adoptive parents; and appoints and oversees the performance of its chief executive officer or equivalent official. This standard does not apply where the person is an individual practitioner.

(c) The agency or person keeps permanent records of the meetings and deliberations of its governing body and of its major decisions affecting the delivery of adoption services.

(d) The agency or person has in place procedures and standards, pursuant to § 96.45 and § 96.46, for the selection, monitoring, and oversight of supervised providers.

(e) The agency or person discloses to the accrediting entity the following information:

(1) Any other names by which the agency or person is or has been known, under either its current or any former form of organization, and the addresses and phone numbers used when such names were used;

(2) The name, address, and phone number of each current director, manager, and employee of the agency or person, and, for any such individual who previously served as a director, manager, or employee of another provider of adoption services, the name, address, and phone number of such other provider; and

(3) The name, address, and phone number of any entity it uses or intends to use as a supervised provider.

### Financial and Risk Management

#### § 96.33 Budget, audit, insurance, and risk assessment requirements.

(a) The agency or person operates under a budget approved by its governing body, if applicable, for management of its funds. The budget discloses all remuneration (including perquisites) paid to the agency's or person's board of directors, managers, employees, and supervised providers.

(b) The agency's or person's finances are subject to annual internal review and oversight and are subject to independent audits every four years. The agency or person submits copies of internal financial review reports for inspection by the accrediting entity each year.

(c) The agency or person submits copies of each audit, as well as any accompanying management letter or qualified opinion letter, for inspection by the accrediting entity.

(d) The agency or person meets the financial reporting requirements of Federal and State laws and regulations.

(e) The agency's or person's balance sheets show that it operates on a sound financial basis and maintains on average sufficient cash reserves, assets, or other financial resources to meet its operating expenses for two months, taking into account its projected volume of cases and its size, scope, and financial commitments. The agency or person has a plan to transfer its Convention cases if it ceases to provide or is no longer permitted to provide adoption services in Convention cases. The plan includes provisions for an organized closure and reimbursement to clients of funds paid for services not yet rendered.

(f) If it accepts charitable donations, the agency or person has safeguards in place to ensure that such donations do

not influence child placement decisions in any way.

(g) The agency or person assesses the risks it assumes, including by reviewing information on the availability of insurance coverage for Convention-related activities. The agency or person uses the assessment to meet the requirements in paragraph (h) of this section and as the basis for determining the type and amount of professional, general, directors' and officers', errors and omissions, and other liability insurance to carry.

(h) The agency or person maintains professional liability insurance in amounts reasonably related to its exposure to risk, but in no case in an amount less than \$1,000,000 in the aggregate.

(i) The agency's or person's chief executive officer, chief financial officer, and other officers or employees with direct responsibility for financial transactions or financial management of the agency or person are bonded.

#### **§ 96.34 Compensation.**

(a) The agency or person does not compensate any individual who provides intercountry adoption services with an incentive fee or contingent fee for each child located or placed for adoption.

(b) The agency or person compensates its directors, officers, employees, and supervised providers who provide intercountry adoption services only for services actually rendered and only on a fee-for-service, hourly wage, or salary basis rather than a contingent fee basis.

(c) The agency or person does not make any payments, promise payment, or give other consideration to any individual directly or indirectly involved in provision of adoption services in a particular case, except for salaries or fees for services actually rendered and reimbursement for costs incurred. This does not prohibit an agency or person from providing in-kind or other donations not intended to influence or affect a particular adoption.

(d) The fees, wages, or salaries paid to the directors, officers, employees, and supervised providers of the agency or person are not unreasonably high in relation to the services actually rendered, taking into account the country in which the adoption services are provided and norms for compensation within the intercountry adoption community in that country, to the extent that such norms are known to the accrediting entity; the location, number, and qualifications of staff; workload requirements; budget; and size of the agency or person.

(e) Any other compensation paid to the agency's or person's directors or members of its governing body is not unreasonably high in relation to the services rendered, taking into account the same factors listed in paragraph (d) of this section and its for-profit or nonprofit status.

(f) The agency or person identifies all vendors to whom clients are referred for non-adoption services and discloses to the accrediting entity any corporate or financial arrangements and any family relationships with such vendors.

#### **Ethical Practices and Responsibilities**

##### **§ 96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention.**

(a) The agency or person provides adoption services ethically and in accordance with the Convention's principles of:

- (1) Ensuring that intercountry adoptions take place in the best interests of children; and
- (2) Preventing the abduction, exploitation, sale, or trafficking of children.

(b) In order to permit the accrediting entity to evaluate the suitability of an agency or person for accreditation or approval, the agency or person discloses to the accrediting entity the following information related to the agency or person, under its current or any former name:

- (1) Any instances in which the agency or person has lost the right to provide adoption services in any State or country, including the basis for such action(s);
- (2) Any instances in which the agency or person was debarred or otherwise denied the authority to provide adoption services in any State or country, including the basis and disposition of such action(s);

(3) Any licensing suspensions for cause or other negative sanctions by oversight bodies against the agency or person, including the basis and disposition of such action(s);

(4) For the prior ten-year period, any disciplinary action(s) against the agency or person by a licensing or accrediting body, including the basis and disposition of such action(s);

(5) For the prior ten-year period, any written complaint(s) related to the provision of adoption-related services, including the basis and disposition of such complaints, against the agency or person filed with any State or Federal or foreign regulatory body and of which the agency or person was notified;

(6) For the prior ten-year period, any known past or pending investigation(s) (by Federal authorities or by public

domestic authorities), criminal charge(s), child abuse charge(s), or lawsuit(s) against the agency or person, related to the provision of child welfare or adoption-related services, and the basis and disposition of such action(s).

(7) Any instances where the agency or person has been found guilty of any crime under Federal, State, or foreign law or has been found to have committed any civil or administrative violation involving financial irregularities under Federal, State, or foreign law;

(8) For the prior five-year period, any instances where the agency or person has filed for bankruptcy; and

(9) Descriptions of any businesses or activities that are inconsistent with the principles of the Convention and that have been or are currently carried out by the agency or person, affiliate organizations, or by any organization in which the agency or person has an ownership or controlling interest.

(c) In order to permit the accrediting entity to evaluate the suitability of an agency or person for accreditation or approval, the agency or person (for its current or any former names) discloses to the accrediting entity the following information about its individual directors, officers, and employees:

- (1) For the prior ten-year period, any conduct by any such individual related to the provision of adoption-related services that was subject to external disciplinary proceeding(s);
- (2) Any convictions or current investigations of any such individual who is in a senior management position for acts involving financial irregularities;

(3) The results of a State criminal background check and a child abuse clearance for any such individual in the United States in a senior management position or who works directly with parent(s) and/or children (unless such checks have been included in the State licensing process); and

(4) A completed FBI Form FD-258 for each such individual in the United States in a senior management position or who works directly with parent(s) and/or children, which the agency or person must keep on file in case future allegations warrant submission of the form for a Federal criminal background check of any such individual.

(5) Descriptions of any businesses or activities that are inconsistent with the principles of the Convention and that are known to have been or are currently carried out by current individual directors, officers, or employees of the agency or person.

(d) In order to permit the accrediting entity to evaluate the suitability of a



person who is an individual practitioner for approval, the individual:

(1) Provides the results of a State criminal background check and a child abuse clearance to the accrediting entity;

(2) Completes and retains a FBI Form FD-258 on file in case future allegations warrant submission of the form for a Federal criminal background check;

(3) If a lawyer, for every jurisdiction in which he or she has ever been admitted to the Bar, provides a certificate of good standing or an explanation of why he or she is not in good standing, accompanied by any relevant documentation and immediately reports to the accrediting entity any disciplinary action considered by a State bar association, regardless of whether the action relates to intercountry adoption; and

(4) If a social worker, for every jurisdiction in which he or she has been licensed, provides a certificate of good standing or an explanation of why he or she is not in good standing, accompanied by any relevant documentation.

(e) In order to permit the accrediting entity to monitor the suitability of an agency or person, the agency or person must disclose any changes in the information required by § 96.35 within thirty business days of learning of the change.

#### **§ 96.36 Prohibition on child buying.**

(a) The agency or person prohibits its employees and agents from giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child. If permitted or required by the child's country of origin, an agency or person may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally. Permitted or required contributions shall not be remitted as payment for the child or as an inducement to release the child.

(b) The agency or person has written policies and procedures in place reflecting the prohibitions in paragraph (a) of this section and reinforces them in its employee training programs.

### **Professional Qualifications and Training for Employees**

#### **§ 96.37 Education and experience requirements for social service personnel.**

(a) The agency or person only uses employees with appropriate qualifications and credentials to perform, in connection with a Convention adoption, adoption-related social service functions that require the application of clinical skills and judgment (home studies, child background studies, counseling, parent preparation, post-placement, and other similar services).

(b) The agency's or person's employees meet any State licensing or regulatory requirements for the services they are providing.

(c) The agency's or person's executive director, the supervisor overseeing a case, or the social service employee providing adoption-related social services that require the application of clinical skills and judgment (home studies, child background studies, counseling, parent preparation, post-placement, and other similar services) has experience in the professional delivery of intercountry adoption services.

(d) *Supervisors.* The agency's or person's social work supervisors have prior experience in family and children's services, adoption, or intercountry adoption and either:

(1) A master's degree from an accredited program of social work;

(2) A master's degree (or doctorate) in a related human service field, including, but not limited to, psychology, psychiatry, psychiatric nursing, counseling, rehabilitation counseling, or pastoral counseling; or

(3) In the case of a social work supervisor who is or was an incumbent at the time the Convention enters into force for the United States, the supervisor has significant skills and experience in intercountry adoption and has regular access for consultation purposes to an individual with the qualifications listed in paragraph (d)(1) or paragraph (d)(2) of this section.

(e) *Non-supervisory employees.* The agency's or person's non-supervisory employees providing adoption-related social services that require the application of clinical skills and judgment other than home studies or child background studies have either:

(1) A master's degree from an accredited program of social work or in another human service field; or

(2) A bachelor's degree from an accredited program of social work; or a combination of a bachelor's degree in any field and prior experience in family

and children's services, adoption, or intercountry adoption; and

(3) Are supervised by an employee of the agency or person who meets the requirements for supervisors in paragraph (d) of this section.

(f) *Home studies.* The agency's or person's employees who conduct home studies:

(1) Are authorized or licensed to complete a home study under the laws of the States in which they practice;

(2) Meet the INA requirements for home study preparers in 8 CFR 204.3(b); and

(3) Are supervised by an employee of the agency or person who meets the requirements in paragraph (d) of this section.

(g) *Child background studies.* The agency's or person's employees who prepare child background studies:

(1) Are authorized or licensed to complete a child background study under the laws of the States in which they practice; and

(2) Are supervised by an employee of the agency or person who meets the requirements in paragraph (d) of this section.

#### **§ 96.38 Training requirements for social service personnel.**

(a) The agency or person provides newly hired employees who have adoption-related responsibilities involving the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) with a comprehensive orientation to intercountry adoption that includes training on:

(1) The requirements of the Convention, the IAA, the regulations implementing the IAA, and other applicable Federal regulations;

(2) The INA regulations applicable to the immigration of children adopted from a Convention country;

(3) The adoption laws of any Convention country where the agency or person provides adoption services;

(4) Relevant State laws;

(5) Ethical considerations in intercountry adoption and prohibitions on child-buying;

(6) The agency's or person's goals, ethical and professional guidelines, organizational lines of accountability, policies, and procedures; and

(7) The cultural diversity of the population(s) served by the agency or person.

(b) In addition to the orientation training required under paragraph (a) of this section, the agency or person provides initial training to newly hired

or current employees whose responsibilities include providing adoption-related social services that involve the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) that addresses:

- (1) The factors in the countries of origin that lead to children needing adoptive families;
  - (2) Feelings of separation, grief, and loss experienced by the child with respect to the family of origin;
  - (3) Attachment and post-traumatic stress disorders;
  - (4) Psychological issues facing children who have experienced abuse or neglect and/or whose parents' rights have been terminated because of abuse or neglect;
  - (5) The impact of institutionalization on child development;
  - (6) Outcomes for children placed for adoption internationally and the benefits of permanent family placements over other forms of government care;
  - (7) The most frequent medical and psychological problems experienced by children from the countries of origin served by the agency or person;
  - (8) The process of developing emotional ties to an adoptive family;
  - (9) Acculturation and assimilation issues, including those arising from factors such as race, ethnicity, religion, and culture and the impact of having been adopted internationally; and
  - (10) Child, adolescent, and adult development as affected by adoption.
- (c) The agency or person ensures that employees who provide adoption-related social services that involve the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) also receive, in addition to the orientation and initial training described in paragraphs (a) and (b) of this section, no less than thirty hours of training every two years, or more if required by State law, on current and emerging adoption practice issues through participation in seminars, conferences, documented distance learning courses, and other similar programs. Continuing education hours required under State law may count toward the thirty hours of training as long as the training is related to current and emerging adoption practice issues.
- (d) The agency or person exempts newly hired and current employees from elements of the orientation and initial training required in paragraphs

(a) and (b) of this section only where the employee has demonstrated experience with intercountry adoption and knowledge of the Convention and the IAA.

#### **Information Disclosure, Fee Practices, and Quality Control Policies and Practices**

##### **§ 96.39 Information disclosure and quality control practices.**

(a) The agency or person fully discloses in writing to the general public upon request and to prospective client(s) upon initial contact:

- (1) Its adoption service policies and practices, including general eligibility criteria and fees;
  - (2) The supervised providers with whom the prospective client(s) can expect to work in the United States and in the child's country of origin and the usual costs associated with their services; and
  - (3) A sample written adoption services contract substantially like the one that the prospective client(s) will be expected to sign should they proceed.
- (b) The agency or person discloses to client(s) and prospective client(s) that the following information is available upon request and makes such information available when requested:
- (1) The number of its adoption placements per year for the prior three calendar years, and the number and percentage of those placements that remain intact, are disrupted, or have been dissolved as of the time the information is provided;
  - (2) The number of parents who apply to adopt on a yearly basis, based on data for the prior three calendar years; and
  - (3) The number of children eligible for adoption and awaiting an adoptive placement referral via the agency or person.

(c) The agency or person does not give preferential treatment to its board members, contributors, volunteers, employees, agents, consultants, or independent contractors with respect to the placement of children for adoption and has a written policy to this effect.

(d) The agency or person requires a client to sign a waiver of liability as part of the adoption service contract only where that waiver complies with applicable State law. Any waiver required is limited and specific, based on risks that have been discussed and explained to the client in the adoption services contract.

(e) The agency or person cooperates with reviews, inspections, and audits by the accrediting entity or the Secretary.

(f) The agency or person uses the internet in the placement of individual

children eligible for adoption only where:

(1) Such use is not prohibited by applicable State or Federal law or by the laws of the child's country of origin;

(2) Such use is subject to controls to avoid misuse and links to any sites that reflect practices that involve the sale, abduction, exploitation, or trafficking of children;

(3) Such use, if it includes photographs, is designed to identify children either who are currently waiting for adoption or who have already been adopted or placed for adoption (and who are clearly so identified); and

(4) Such use does not serve as a substitute for the direct provision of adoption services, including services to the child, the prospective adoptive parent(s), and/or the birth parent(s).

##### **§ 96.40 Fee policies and procedures.**

(a) The agency or person provides to all applicants, prior to application, a written schedule of expected total fees and estimated expenses and an explanation of the conditions under which fees or expenses may be charged, waived, reduced, or refunded and of when and how the fees and expenses must be paid.

(b) Before providing any adoption service to prospective adoptive parent(s), the agency or person itemizes and discloses in writing the following information for each separate category of fees and estimated expenses that the prospective adoptive parent(s) will be charged in connection with a Convention adoption:

(1) *Home study.* The expected total fees and estimated expenses for home study preparation and approval, whether the home study is to be prepared directly by the agency or person itself, or prepared by a supervised provider, exempted provider, or approved person and approved as required under § 96.47;

(2) *Adoption expenses in the United States.* The expected total fees and estimated expenses for all adoption services other than the home study that will be provided in the United States. This category includes, but is not limited to, personnel costs, administrative overhead, operational costs, training and education, communications and publications costs, and any other costs related to providing adoption services in the United States;

(3) *Foreign country program expenses.* The expected total fees and estimated expenses for all adoption services that will be provided in the child's Convention country. This category includes, but is not limited to, costs for

personnel, administrative overhead, training, education, legal services, and communications, and any other costs related to providing adoption services in the child's Convention country;

(4) *Care of the child.* The expected total fees and estimated expenses charged to prospective adoptive parent(s) for the care of the child in the country of origin prior to adoption, including, but not limited to, costs for food, clothing, shelter and medical care; foster care services; orphanage care; and any other services provided directly to the child;

(5) *Translation and document expenses.* The expected total fees and estimated expenses for obtaining any necessary documents and for any translation of documents related to the adoption, along with information on whether the prospective adoptive parent(s) will be expected to pay such costs directly or to third parties, either in the United States or in the child's Convention country, or through the agency or person. This category includes, but is not limited to, costs for obtaining, translating, or copying records or documents required to complete the adoption, costs for the child's Convention court documents, passport, adoption certificate and other documents related to the adoption, and costs for notarizations and certifications;

(6) *Contributions.* Any fixed contribution amount or percentage that the prospective adoptive parent(s) will be expected or required to make to child protection or child welfare service programs in the child's Convention country or in the United States, along with an explanation of the intended use of the contribution and the manner in which the transaction will be recorded and accounted for; and

(7) *Post-placement and post-adoption reports.* The expected total fees and estimated expenses for any post-placement or post-adoption reports that the agency or person or parent(s) must prepare in light of any requirements of the expected country of origin.

(c) If the following fees and estimated expenses were not disclosed as part of the categories identified in paragraph (b) of this section, the agency or person itemizes and discloses in writing any:

(1) *Third party fees.* The expected total fees and estimated expenses for services that the prospective adoptive parent(s) will be responsible to pay directly to a third party. Such third party fees include, but are not limited to, fees to competent authorities for services rendered or Central Authority processing fees; and

(2) *Travel and accommodation expenses.* The expected total fees and

estimated expenses for any travel, transportation, and accommodation services arranged by the agency or person for the prospective adoptive parent(s).

(d) The agency or person also specifies in its adoption services contract when and how funds advanced to cover fees or expenses will be refunded if adoption services are not provided.

(e) When the agency or person uses part of its fees to provide special services, such as cultural programs for adoptee(s), scholarships or other services, it discloses this policy to the prospective adoptive parent(s) in advance of providing any adoption services and gives the prospective adoptive parent(s) a general description of the programs supported by such funds.

(f) The agency or person has mechanisms in place for transferring funds to Convention countries when the financial institutions of the Convention country so permit and for obtaining written receipts for such transfers, so that direct cash transactions by the prospective adoptive parent(s) to pay for adoption services provided in the Convention country are minimized or unnecessary.

(g) The agency or person does not customarily charge additional fees and expenses beyond those disclosed in the adoption services contract and has a written policy to this effect. In the event that unforeseen additional fees and expenses are incurred in the Convention country, the agency or person charges such additional fees and expenses only under the following conditions:

(1) It discloses the fees and expenses in writing to the prospective adoptive parent(s);

(2) It obtains the specific consent of the prospective adoptive parent(s) prior to expending any funds in excess of \$1000 for which the agency or person will hold the prospective adoptive parent(s) responsible or gives the prospective adoptive parent(s) the opportunity to waive the notice and consent requirement in advance. If the prospective adoptive parent(s) has the opportunity to waive the notice and consent requirement in advance, this policy is reflected in the written policies and procedures of the agency or person; and

(3) It provides written receipts to the prospective adoptive parent(s) for fees and expenses paid directly by the agency or person in the Convention country and retains copies of such receipts.

(h) The agency or person returns any funds to which the prospective adoptive

parent(s) may be entitled within sixty days of the completion of the delivery of services.

### **Responding to Complaints and Records and Reports Management**

#### **§ 96.41 Procedures for responding to complaints and improving service delivery.**

(a) The agency or person has written complaint policies and procedures that incorporate the standards in paragraphs (b) through (h) of this section and provides a copy of such policies and procedures, including contact information for the Complaint Registry, to client(s) at the time the adoption services contract is signed.

(b) The agency or person permits any birth parent, prospective adoptive parent or adoptive parent, or adoptee to lodge directly with the agency or person signed and dated complaints about any of the services or activities of the agency or person (including its use of supervised providers) that he or she believes raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA, and advises such individuals of the additional procedures available to them if they are dissatisfied with the agency's or person's response to their complaint.

(c) The agency or person responds in writing to complaints received pursuant to paragraph (b) of this section within thirty days of receipt, and provides expedited review of such complaints that are time-sensitive or that involve allegations of fraud.

(d) The agency or person maintains a written record of each complaint received pursuant to paragraph (b) of this section and the steps taken to investigate and respond to it and makes this record available to the accrediting entity or the Secretary upon request.

(e) The agency or person does not take any action to discourage a client or prospective client from, or retaliate against a client or prospective client for: making a complaint; expressing a grievance; providing information in writing or interviews to an accrediting entity on the agency's or person's performance; or questioning the conduct of or expressing an opinion about the performance of an agency or person.

(f) The agency or person provides to the accrediting entity and the Secretary, on a semi-annual basis, a summary of all complaints received pursuant to paragraph (b) of this section during the preceding six months (including the number of complaints received and how each complaint was resolved) and an assessment of any discernible patterns in complaints received against the agency or person pursuant to paragraph

(b) of this section, along with information about what systemic changes, if any, were made or are planned by the agency or person in response to such patterns.

(g) The agency or person provides any information about complaints received pursuant to paragraph (b) of this section as may be requested by the accrediting entity or the Secretary.

(h) The agency or person has a quality improvement program appropriate to its size and circumstances through which it makes systematic efforts to improve its adoption services as needed. The agency or person uses quality improvement methods such as reviewing complaint data, using client satisfaction surveys, or comparing the agency's or person's practices and performance against the data contained in the Secretary's annual reports to Congress on intercountry adoptions.

**§ 96.42 Retention, preservation, and disclosure of adoption records.**

(a) The agency or person retains or archives adoption records in a safe, secure, and retrievable manner for the period of time required by applicable State law.

(b) The agency or person makes readily available to the adoptee and the adoptive parent(s) upon request all non-identifying information in its custody about the adoptee's health history or background.

(c) The agency or person ensures that personal data gathered or transmitted in connection with an adoption is used only for the purposes for which the information was gathered and safeguards sensitive individual information.

(d) The agency or person has a plan that is consistent with the provisions of this section, the plan required under § 96.33, and applicable State law for transferring custody of adoption records that are subject to retention or archival requirements to an appropriate custodian, and ensuring the accessibility of those adoption records, in the event that the agency or person ceases to provide or is no longer permitted to provide adoption services under the Convention.

(e) The agency or person notifies the accrediting entity and the Secretary in writing within thirty days of the time it ceases to provide or is no longer permitted to provide adoption services and provides information about the transfer of its adoption records.

**§ 96.43 Case tracking, data management, and reporting.**

(a) When acting as the primary provider, the agency or person

maintains all the data required in this section in a format approved by the accrediting entity and provides it to the accrediting entity on an annual basis.

(b) When acting as the primary provider, the agency or person routinely generates and maintains reports as follows:

(1) For cases involving children immigrating to the United States, information and reports on the total number of intercountry adoptions undertaken by the agency or person each year in both Convention and non-Convention cases and, for each case:

- (i) The Convention country or other country from which the child emigrated;
- (ii) The State to which the child immigrated;
- (iii) The State, Convention country, or other country in which the adoption was finalized;
- (iv) The age of the child; and
- (v) The date of the child's placement for adoption.

(2) For cases involving children emigrating from the United States, information and reports on the total number of intercountry adoptions undertaken by the agency or person each year in both Convention and non-Convention cases and, for each case:

- (i) The State from which the child emigrated;
- (ii) The Convention country or other country to which the child immigrated;
- (iii) The State, Convention country, or other country in which the adoption was finalized;
- (iv) The age of the child; and
- (v) The date of the child's placement for adoption.

(3) For each disrupted placement involving a Convention adoption, information and reports about the disruption, including information on:

- (i) The Convention country from which the child emigrated;
- (ii) The State to which the child immigrated;
- (iii) The age of the child;
- (iv) The date of the child's placement for adoption;
- (v) The reason(s) for and resolution(s) of the disruption of the placement for adoption, including information on the child's re-placement for adoption and final legal adoption;
- (vi) The names of the agencies or persons that handled the placement for adoption; and
- (vii) The plans for the child.

(4) Wherever possible, for each dissolution of a Convention adoption, information and reports on the dissolution, including information on:

- (i) The Convention country from which the child emigrated;
- (ii) The State to which the child immigrated;

- (iii) The age of the child;
- (iv) The date of the child's placement for adoption;

(v) The reason(s) for and resolution(s) of the dissolution of the adoption, to the extent known by the agency or person;

(vi) The names of the agencies or persons that handled the placement for adoption; and

(vii) The plans for the child.

(5) Information on the shortest, longest, and average length of time it takes to complete a Convention adoption, set forth by the child's country of origin, calculated from the time the child is matched with the prospective adoptive parent(s) until the time the adoption is finalized by a court, excluding any period for appeal;

(6) Information on the range of adoption fees, including the lowest, highest, average, and the median of such fees, set forth by the child's country of origin, charged by the agency or person for Convention adoptions involving children immigrating to the United States in connection with their adoption.

(c) If the agency or person provides adoption services in cases not subject to the Convention that involve a child emigrating from the United States for the purpose of adoption or after an adoption has been finalized, it provides such information as required by the Secretary directly to the Secretary and demonstrates to the accrediting entity that it has provided this information.

(d) The agency or person provides any of the information described in paragraphs (a) through (c) of this section to the accrediting entity or the Secretary within thirty days of request.

**Service Planning and Delivery**

**§ 96.44 Acting as primary provider.**

(a) When required by § 96.14(a), the agency or person acts as primary provider and adheres to the provisions in § 96.14(b) through (e). When acting as the primary provider, the agency or person develops and implements a service plan for providing all adoption services and provides all such services, either directly or through arrangements with supervised providers, exempted providers, public domestic authorities, competent authorities, Central Authorities, public foreign authorities, or, to the extent permitted by § 96.14(c), other foreign providers (agencies, persons, or other non-governmental entities).

(b) The agency or person has an organizational structure, financial and personnel resources, and policies and procedures in place that demonstrate that the agency or person is capable of

acting as a primary provider in any Convention adoption case and, when acting as the primary provider, provides appropriate supervision to supervised providers and verifies the work of other foreign providers in accordance with §§ 96.45 and 96.46.

**§ 96.45 Using supervised providers in the United States.**

(a) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, ensures that each such supervised provider:

(1) Is in compliance with applicable State licensing and regulatory requirements in all jurisdictions in which it provides adoption services;

(2) Does not engage in practices inconsistent with the Convention's principles of furthering the best interests of the child and preventing the sale, abduction, exploitation, or trafficking of children; and

(3) Before entering into an agreement with the primary provider for the provision of adoption services, discloses to the primary provider the suitability information listed in § 96.35.

(b) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, ensures that each such supervised provider operates under a written agreement with the primary provider that:

(1) Identifies clearly the adoption service(s) to be provided by the supervised provider and requires that the service(s) be provided in accordance with the applicable service standard(s) for accreditation and approval (for example: home study (§ 96.47); parent training (§ 96.48); child background studies and consent (§ 96.53));

(2) Requires the supervised provider to comply with the following standards regardless of the type of adoption services it is providing: § 96.36 (prohibition on child-buying), § 96.34 (compensation), § 96.38 (employee training), § 96.39(d) (waivers of liability), and § 96.41(b) through (e) (complaints);

(3) Identifies specifically the lines of authority between the primary provider and the supervised provider, the employee of the primary provider who will be responsible for supervision, and the employee of the supervised provider who will be responsible for ensuring compliance with the written agreement;

(4) States clearly the compensation arrangement for the services to be provided and the fees and expenses to be charged by the supervised provider;

(5) Specifies whether the supervised provider's fees and expenses will be billed to and paid by the client(s) directly or billed to the client through the primary provider;

(6) Provides that, if billing the client(s) directly for its service, the supervised provider will give the client(s) an itemized bill of all fees and expenses to be paid, with a written explanation of how and when such fees and expenses will be refunded if the service is not completed, and will return any funds collected to which the client(s) may be entitled within sixty days of the completion of the delivery of services;

(7) Requires the supervised provider to meet the same personnel qualifications as accredited agencies and approved persons, as provided for in § 96.37, except that, for purposes of §§ 96.37(e)(3), (f)(3), and (g)(2), the work of the employee must be supervised by an employee of an accredited agency or approved person;

(8) Requires the supervised provider to limit the use of and safeguard personal data gathered or transmitted in connection with an adoption, as provided for in § 96.42;

(9) Requires the supervised provider to respond within a reasonable period of time to any request for information from the primary provider, the Secretary, or the accrediting entity that issued the primary provider's accreditation or approval;

(10) Requires the supervised provider to provide the primary provider on a timely basis any data that is necessary to comply with the primary provider's reporting requirements;

(11) Requires the supervised provider to disclose promptly to the primary provider any changes in the suitability information required by § 96.35;

(12) Permits suspension or termination of the agreement on reasonable notice if the primary provider has grounds to believe that the supervised provider is not in compliance with the agreement or the requirements of this section.

**§ 96.46 Using providers in Convention countries.**

(a) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider:

(1) Is in compliance with the laws of the Convention country in which it operates;

(2) Does not engage in practices inconsistent with the Convention's principles of furthering the best

interests of the child and preventing the sale, abduction, exploitation, or trafficking of children;

(3) Before entering into an agreement with the primary provider for the provision of adoption services, discloses to the primary provider the suitability information listed in § 96.35, taking into account the authorities in the Convention country that are analogous to the authorities identified in that section;

(4) Does not have a pattern of licensing suspensions or other sanctions and has not lost the right to provide adoption services in any jurisdiction for reasons germane to the Convention; and

(5) Is accredited in the Convention country in which it operates, if such accreditation is required by the laws of that Convention country to perform the adoption services it is providing.

(b) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider operates under a written agreement with the primary provider that:

(1) Identifies clearly the adoption service(s) to be provided by the foreign supervised provider;

(2) Requires the foreign supervised provider, if responsible for obtaining medical or social information on the child, to comply with the standards in § 96.49(d) through (j);

(3) Requires the foreign supervised provider to adhere to the standard in § 96.36(a) prohibiting child buying; and has written policies and procedures in place reflecting the prohibitions in § 96.36(a) and reinforces them in training programs for its employees and agents;

(4) Requires the foreign supervised provider to compensate its directors, officers, and employees who provide intercountry adoption services on a fee-for-service, hourly wage, or salary basis, rather than based on whether a child is placed for adoption, located for an adoptive placement, or on a similar contingent fee basis;

(5) Identifies specifically the lines of authority between the primary provider and the foreign supervised provider, the employee of the primary provider who will be responsible for supervision, and the employee of the supervised provider who will be responsible for ensuring compliance with the written agreement;

(6) States clearly the compensation arrangement for the services to be provided and the fees and expenses to be charged by the foreign supervised provider;

(7) Specifies whether the foreign supervised provider's fees and expenses will be billed to and paid by the client(s) directly or billed to the client through the primary provider;

(8) Provides that, if billing the client(s) directly for its service, the foreign supervised provider will give the client(s) an itemized bill of all fees and expenses to be paid, with a written explanation of how and when such fees and expenses will be refunded if the service is not completed, and will return any funds collected to which the client(s) may be entitled within sixty days of the completion of the delivery of services;

(9) Requires the foreign supervised provider to respond within a reasonable period of time to any request for information from the primary provider, the Secretary, or the accrediting entity that issued the primary provider's accreditation or approval;

(10) Requires the foreign supervised provider to provide the primary provider on a timely basis any data that is necessary to comply with the primary provider's reporting requirements;

(11) Requires the foreign supervised provider to disclose promptly to the primary provider any changes in the suitability information required by § 96.35; and

(12) Permits suspension or termination of the agreement on reasonable notice if the primary provider has grounds to believe that the foreign supervised provider is not in compliance with the agreement or the requirements of this section.

(c) The agency or person, when acting as the primary provider and, in accordance with § 96.14, using foreign providers that are not under its supervision, verifies, through review of the relevant documentation and other appropriate steps, that:

(1) Any necessary consent to termination of parental rights or to adoption obtained by the foreign provider was obtained in accordance with applicable foreign law and Article 4 of the Convention;

(2) Any background study and report on a child in a case involving immigration to the United States (an incoming case) performed by the foreign provider was performed in accordance with applicable foreign law and Article 16 of the Convention.

(3) Any home study and report on prospective adoptive parent(s) in a case involving emigration from the United States (an outgoing case) performed by the foreign provider was performed in accordance with applicable foreign law and Article 15 of the Convention.

### Standards for Cases in Which a Child Is Immigrating to the United States (Incoming Cases)

#### § 96.47 Preparation of home studies in incoming cases.

(a) The agency or person ensures that a home study on the prospective adoptive parent(s) (which for purposes of this section includes the initial report and any supplemental statement submitted to DHS) is completed that includes the following:

(1) Information about the prospective adoptive parent(s)' identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the children for whom the prospective adoptive parent(s) would be qualified to care (specifying in particular whether they are willing and able to care for a child with special needs);

(2) A determination whether the prospective adoptive parent(s) are eligible and suited to adopt;

(3) A statement describing the counseling and training provided to the prospective adoptive parent(s);

(4) The results of a criminal background check on the prospective adoptive parent(s) and any other individual for whom a check is required by 8 CFR 204.3(e);

(5) A full and complete statement of all facts relevant to the eligibility and suitability of the prospective adoptive parent(s) to adopt a child under any specific requirements identified to the Secretary by the Central Authority of the child's country of origin; and

(6) A statement in each copy of the home study that it is a true and accurate copy of the home study that was provided to the prospective adoptive parent(s) or DHS.

(b) The agency or person ensures that the home study is performed in accordance with 8 CFR 204.3(e), and any applicable State law.

(c) Where the home study is not performed in the first instance by an accredited agency or temporarily accredited agency, the agency or person ensures that the home study is reviewed and approved in writing by an accredited agency or temporarily accredited agency. The written approval must include a determination that the home study:

(1) Includes all of the information required by paragraph (a) of this section and is performed in accordance with 8 CFR 204.3(e), and applicable State law; and

(2) Was performed by an individual who meets the requirements in

§ 96.37(f), or, if the individual is an exempted provider, ensures that the individual meets the requirements for home study providers established by 8 CFR 204.3(b).

(d) The agency or person takes all appropriate measures to ensure the timely transmission of the same home study that was provided to the prospective adoptive parent(s) or to DHS to the Central Authority of the child's country of origin (or to an alternative authority designated by that Central Authority).

#### § 96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.

(a) The agency or person provides prospective adoptive parent(s) with at least ten hours (independent of the home study) of preparation and training, as described in paragraphs (b) and (c) of this section, designed to promote a successful intercountry adoption. The agency or person provides such training before the prospective adoptive parent(s) travel to adopt the child or the child is placed with the prospective adoptive parent(s) for adoption.

(b) The training provided by the agency or person addresses the following topics:

(1) The intercountry adoption process, the general characteristics and needs of children awaiting adoption, and the intercountry conditions that affect children in the Convention country from which the prospective adoptive parent(s) plan to adopt;

(2) The effects on children of malnutrition, relevant environmental toxins, maternal substance abuse, and of any other known genetic, health, emotional, and developmental risk factors associated with children from the expected country of origin;

(3) Information about the impact on a child of leaving familiar ties and surroundings, as appropriate to the expected age of the child;

(4) Data on institutionalized children and the impact of institutionalization on children, including the effect on children of the length of time spent in an institution and of the type of care provided in the expected country of origin;

(5) Information on attachment disorders and other emotional problems that institutionalized or traumatized children and children with a history of multiple caregivers may experience, before and after their adoption;

(6) Information on the laws and adoption processes of the expected country of origin, including foreseeable delays and impediments to finalization of an adoption;

(7) Information on the long-term implications for a family that has become multicultural through intercountry adoption; and

(8) An explanation of any reporting requirements associated with Convention adoptions, including any post-placement or post-adoption reports required by the expected country of origin.

(c) The agency or person also provides the prospective adoptive parent(s) with training that allows them to be as fully prepared as possible for the adoption of a particular child. This includes counseling on:

(1) The child's history and cultural, racial, religious, ethnic, and linguistic background;

(2) The known health risks in the specific region or country where the child resides; and

(3) Any other medical, social, background, birth history, educational data, developmental history, or any other data known about the particular child.

(d) The agency or person provides such training through appropriate methods, including:

(1) Collaboration among agencies or persons to share resources to meet the training needs of prospective adoptive parents;

(2) Group seminars offered by the agency or person or other agencies or training entities;

(3) Individual counseling sessions;

(4) Video, computer-assisted, or distance learning methods using standardized curricula; or

(5) In cases where training cannot otherwise be provided, an extended home study process, with a system for evaluating the thoroughness with which the topics have been covered.

(e) The agency or person provides additional in-person, individualized counseling and preparation, as needed, to meet the needs of the prospective adoptive parent(s) in light of the particular child to be adopted and his or her special needs, and any other training or counseling needed in light of the child background study or the home study.

(f) The agency or person provides the prospective adoptive parent(s) with information about print, internet, and other resources available for continuing to acquire information about common behavioral, medical, and other issues; connecting with parent support groups, adoption clinics and experts; and seeking appropriate help when needed.

(g) The agency or person exempts prospective adoptive parent(s) from all or part of the training and preparation that would normally be required for a

specific adoption only when the agency or person determines that the prospective adoptive parent(s) have received adequate prior training or have prior experience as parent(s) of children adopted from abroad.

(h) The agency or person records the nature and extent of the training and preparation provided to the prospective adoptive parent(s) in the adoption record.

#### **§ 96.49 Provision of medical and social information in incoming cases.**

(a) The agency or person provides a copy of the child's medical records (including, to the fullest extent practicable, a correct and complete English-language translation of such records) to the prospective adoptive parent(s) as early as possible, but no later than two weeks before either the adoption or placement for adoption, or the date on which the prospective adoptive parent(s) travel to the Convention country to complete all procedures in such country relating to the adoption or placement for adoption, whichever is earlier.

(b) Where any medical record provided pursuant to paragraph (a) of this section is a summary or compilation of other medical records, the agency or person includes those underlying medical records in the medical records provided pursuant to paragraph (a) if they are available.

(c) The agency or person provides the prospective adoptive parent(s) with any untranslated medical reports or videotapes or other reports and provides an opportunity for the client(s) to arrange for their own translation of the records, including a translation into a language other than English, if needed.

(d) The agency or person itself uses reasonable efforts, or requires its supervised provider in the child's country of origin who is responsible for obtaining medical information about the child on behalf of the agency or person to use reasonable efforts, to obtain available information, including in particular:

(1) The date that the Convention country or other child welfare authority assumed custody of the child and the child's condition at that time;

(2) History of any significant illnesses, hospitalizations, special needs, and changes in the child's condition since the Convention country or other child welfare authority assumed custody of the child;

(3) Growth data, including prenatal and birth history, and developmental status over time and current developmental data at the time of the child's referral for adoption; and

(4) Specific information on the known health risks in the specific region or country where the child resides.

(e) If the agency or person provides medical information, other than the information provided by public foreign authorities, to the prospective adoptive parent(s) from an examination by a physician or from an observation of the child by someone who is not a physician, the agency or person uses reasonable efforts to include the following:

(1) The name and credentials of the physician who performed the examination or the individual who observed the child;

(2) The date of the examination or observation; how the report's information was retained and verified; and if anyone directly responsible for the child's care has reviewed the report;

(3) If the medical information includes references, descriptions, or observations made by any individual other than the physician who performed the examination or the individual who performed the observation, the identity of that individual, the individual's training, and information on what data and perceptions the individual used to draw his or her conclusions;

(4) A review of hospitalizations, significant illnesses, and other significant medical events, and the reasons for them;

(5) Information about the full range of any tests performed on the child, including tests addressing known risk factors in the child's country of origin; and

(6) Current health information.

(f) The agency or person itself uses reasonable efforts, or requires its supervised provider in the child's country of origin who is responsible for obtaining social information about the child on behalf of the agency or person to use reasonable efforts, to obtain available information, including in particular:

(1) Information about the child's birth family and prenatal history and cultural, racial, religious, ethnic, and linguistic background;

(2) Information about all of the child's past and current placements prior to adoption, including, but not limited to any social work or court reports on the child and any information on who assumed custody and provided care for the child; and

(3) Information about any birth siblings whose existence is known to the agency or person, or its supervised provider, including information about such siblings' whereabouts.

(g) Where any of the information listed in paragraphs (d) and (f) of this

section cannot be obtained, the agency or person documents in the adoption record the efforts made to obtain the information and why it was not obtainable. The agency or person continues to use reasonable efforts to secure those medical or social records that could not be obtained up until the adoption is finalized.

(h) Where available, the agency or person provides information for contacting the examining physician or the individual who made the observations to any physician engaged by the prospective adoptive parent(s), upon request.

(i) The agency or person ensures that videotapes and photographs of the child are identified by the date on which the videotape or photograph was recorded or taken and that they were made in compliance with the laws in the country where recorded or taken.

(j) The agency or person does not withhold from or misrepresent to the prospective adoptive parent(s) any available medical, social, or other pertinent information concerning the child.

(k) The agency or person does not withdraw a referral until the prospective adoptive parent(s) have had two weeks (unless extenuating circumstances involving the child's best interests require a more expedited decision) to consider the needs of the child and their ability to meet those needs, and to obtain physician review of medical information and other descriptive information, including videotapes of the child if available.

**§ 96.50 Placement and post-placement monitoring until final adoption in incoming cases.**

(a) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the prospective adoptive parent(s).

(b) In the post-placement phase, the agency or person monitors and supervises the child's placement to ensure that the placement remains in the best interests of the child, and ensures that at least the number of home visits required by State law or by the child's country of origin are performed, whichever is greater.

(c) When a placement for adoption is in crisis in the post-placement phase, the agency or person makes an effort to provide or arrange for counseling by an individual with appropriate skills to assist the family in dealing with the problems that have arisen.

(d) If counseling does not succeed in resolving the crisis and the placement is disrupted, the agency or person assuming custody of the child assumes responsibility for making another placement of the child.

(e) The agency or person acts promptly and in accord with any applicable legal requirements to remove the child when the placement may no longer be in the child's best interests, to provide temporary care, to find an eventual adoptive placement for the child, and, in consultation with the Secretary, to inform the Central Authority of the child's country of origin about any new prospective adoptive parent(s).

(1) In all cases where removal of a child from a placement is considered, the agency or person considers the child's views when appropriate in light of the child's age and maturity and, when required by State law, obtains the consent of the child prior to removal.

(2) The agency or person does not return from the United States a child placed for adoption in the United States unless the Central Authority of the country of origin and the Secretary have approved the return in writing.

(f) The agency or person includes in the adoption services contract with the prospective adoptive parent(s) a plan describing the agency's or person's responsibilities if a placement for adoption is disrupted. This plan addresses:

(1) Who will have legal and financial responsibility for transfer of custody in an emergency or in the case of impending disruption and for the care of the child;

(2) If the disruption takes place after the child has arrived in the United States, under what circumstances the child will, as a last resort, be returned to the child's country of origin, if that is determined to be in the child's best interests;

(3) How the child's wishes, age, length of time in the United States, and other pertinent factors will be taken into account; and

(4) How the Central Authority of the child's country of origin and the Secretary will be notified.

(g) The agency or person provides post-placement reports until final adoption of a child to the Convention country when required by the Convention country. Where such reports are required, the agency or person:

(1) Informs the prospective adoptive parent(s) in the adoption services contract of the requirement prior to the referral of the child for adoption;

(2) Informs the prospective adoptive parent(s) that they will be required to

provide all necessary information for the report(s); and

(3) Discloses who will prepare the reports and the fees that will be charged.

(h) The agency or person takes steps to:

(1) Ensure that an order declaring the adoption as final is sought by the prospective adoptive parent(s), and entered in compliance with section 301(c) of the IAA (42 U.S.C. 14931(c)); and

(2) Notify the Secretary of the finalization of the adoption within thirty days of the entry of the order.

**§ 96.51 Post-adoption services in incoming cases.**

(a) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the adoptive parent(s).

(b) The agency or person informs the prospective adoptive parent(s) in the adoption services contract whether the agency or person will or will not provide any post-adoption services. The agency or person also informs the prospective adoptive parent(s) in the adoption services contract whether it will provide services if an adoption is dissolved, and, if it indicates it will, it provides a plan describing the agency's or person's responsibilities.

(c) When post-adoption reports are required by the child's country of origin, the agency or person includes a requirement for such reports in the adoption services contract and makes good-faith efforts to encourage adoptive parent(s) to provide such reports.

(d) The agency or person does not return from the United States an adopted child whose adoption has been dissolved unless the Central Authority of the country of origin and the Secretary have approved the return in writing.

**§ 96.52 Performance of Convention communication and coordination functions in incoming cases.**

(a) The agency or person keeps the Central Authority of the Convention country and the Secretary informed as necessary about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

(b) The agency or person takes all appropriate measures, consistent with the procedures of the U.S. Central Authority and of the Convention country, to:

(1) Transmit on a timely basis the home study to the Central Authority or



other competent authority of the child's country of origin;

(2) Obtain the child background study, proof that the necessary consents to the child's adoption have been obtained, and the necessary determination that the prospective placement is in the child's best interests, from the Central Authority or other competent authority in the child's country of origin;

(3) Provide confirmation that the prospective adoptive parent(s) agree to the adoption to the Central Authority or other competent authority in the child's country of origin; and

(4) Transmit the determination that the child is or will be authorized to enter and reside permanently in the United States to the Central Authority or other competent authority in the child's country of origin.

(c) The agency or person takes all necessary and appropriate measures, consistent with the procedures of the Convention country, to obtain permission for the child to leave his or her country of origin and to enter and reside permanently in the United States.

(d) Where the transfer of the child does not take place, the agency or person returns the home study on the prospective adoptive parent(s) and/or the child background study to the authorities that forwarded them.

(e) The agency or person takes all necessary and appropriate measures to perform any tasks in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

#### **Standards for Cases in Which a Child Is Emigrating From the United States (Outgoing Cases)**

##### **§ 96.53 Background studies on the child and consents in outgoing cases.**

(a) The agency or person takes all appropriate measures to ensure that a child background study is performed that includes information about the child's identity, adoptability, background, social environment, family history, medical history (including that of the child's family), and any special needs of the child. The child background study must include the following:

(1) Information that demonstrates that consents were obtained in accordance with paragraph (c) of this section;

(2) Information that demonstrates consideration of the child's wishes and opinions in accordance with paragraph (d) of this section and;

(3) Information that confirms that the child background study was prepared

either by an exempted provider or by an individual who meets the requirements set forth in § 96.37(g).

(b) Where the child background study is not prepared in the first instance by an accredited agency or temporarily accredited agency, the agency or person ensures that the child background study is reviewed and approved in writing by an accredited agency or temporarily accredited agency. The written approval must include a determination that the background study includes all the information required by paragraph (a) of this section.

(c) The agency or person takes all appropriate measures to ensure that consents have been obtained as follows:

(1) The persons, institutions, and authorities whose consent is necessary for adoption have been counseled as necessary and duly informed of the effects of their consent, in particular, whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;

(2) All such persons, institutions, and authorities have given their consents;

(3) The consents have been expressed or evidenced in writing in the required legal form, have been given freely, were not induced by payments or compensation of any kind, and have not been withdrawn;

(4) The consent of the mother, where required, was executed after the birth of the child;

(5) The child, as appropriate in light of his or her age and maturity, has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption; and

(6) The child's consent, where required, has been given freely, in the required legal form, and expressed or evidenced in writing and not induced by payment or compensation of any kind.

(d) If the child is twelve years of age or older, or as otherwise provided by State law, the agency or person gives due consideration to the child's wishes or opinions before determining that an intercountry placement is in the child's best interests.

(e) The agency or person prior to the child's adoption takes all appropriate measures to transmit to the Central Authority or other competent authority or accredited bodies of the Convention country the child background study, proof that the necessary consents have been obtained, and the reasons for its determination that the placement is in the child's best interests. In doing so, the agency or person, as required by Article 16(2) of the Convention, does not reveal the identity of the mother or

the father if these identities may not be disclosed under State law.

##### **§ 96.54 Placement standards in outgoing cases.**

(a) Except in the case of adoption by relatives or in the case in which the birth parent(s) have identified specific prospective adoptive parent(s) or in other special circumstances accepted by the State court with jurisdiction over the case, the agency or person makes reasonable efforts to find a timely adoptive placement for the child in the United States by:

(1) Disseminating information on the child and his or her availability for adoption through print, media, and internet resources designed to communicate with potential prospective adoptive parent(s) in the United States;

(2) Listing information about the child on a national or State adoption exchange or registry for at least sixty calendar days after the birth of the child;

(3) Responding to inquiries about adoption of the child; and

(4) Providing a copy of the child background study to potential U.S. prospective adoptive parent(s).

(b) The agency or person demonstrates to the satisfaction of the State court with jurisdiction over the adoption that sufficient reasonable efforts (including no efforts, when in the best interests of the child) to find a timely and qualified adoptive placement for the child in the United States were made.

(c) In placing the child for adoption, the agency or person:

(1) To the extent consistent with State law, gives significant weight to the placement preferences expressed by the birth parent(s) in all voluntary placements;

(2) To the extent consistent with State law, makes diligent efforts to place siblings together for adoption and, where placement together is not possible, to arrange for contact between separated siblings, unless it is in the best interests of one of the siblings that such efforts or contact not take place; and

(3) Complies with all applicable requirements of the Indian Child Welfare Act.

(d) The agency or person complies with any State law requirements pertaining to the provision and payment of independent legal counsel for birth parents. If State law requires full disclosure to the birth parent(s) that the child is to be adopted by parent(s) who reside outside the United States, the agency or person provides such disclosure.

(e) The agency or person takes all appropriate measures to give due consideration to the child's upbringing and to his or her ethnic, religious, and cultural background.

(f) When particular prospective adoptive parent(s) in a Convention country have been identified, the agency or person takes all appropriate measures to determine whether the envisaged placement is in the best interests of the child, on the basis of the child background study and the home study on the prospective adoptive parent(s).

(g) The agency or person thoroughly prepares the child for the transition to the Convention country, using age-appropriate services that address the child's likely feelings of separation, grief, and loss and difficulties in making any cultural, religious, racial, ethnic, or linguistic adjustment.

(h) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the adoptive parent(s) or the prospective adoptive parent(s);

(i) Before the placement for adoption proceeds, the agency or person identifies the entity in the receiving country that will provide post-placement supervision and reports, if required by State law, and ensures that the child's adoption record contains the information necessary for contacting that entity.

(j) The agency or person ensures that the child's adoption record includes the order granting the adoption or legal custody for the purpose of adoption in the Convention country.

(k) The agency or person consults with the Secretary before arranging for the return to the United States of any child who has emigrated to a Convention country in connection with the child's adoption.

**§ 96.55 Performance of Convention communication and coordination functions in outgoing cases.**

(a) The agency or person keeps the Central Authority of the Convention country and the Secretary informed as necessary about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

(b) The agency or person ensures that:

(1) Copies of all documents from the State court proceedings, including the order granting the adoption or legal custody, are provided to the Secretary;

(2) Any additional information on the adoption is transmitted to the Secretary promptly upon request; and

(3) It otherwise facilitates, as requested, the Secretary's ability to provide the certification that the child has been adopted or that custody has been granted for the purpose of adoption, in accordance with the Convention and the IAA.

(c) Where the transfer of the child does not take place, the agency or person returns the home study on the prospective adoptive parent(s) and/or the child background study to the authorities that forwarded them.

(d) The agency or person provides to the State court with jurisdiction over the adoption:

(1) Proof that consents have been given as required in § 96.53(c);

(2) An English copy or certified English translation of the home study on the prospective adoptive parent(s) in the Convention country, and the determination by the agency or person that the placement with the prospective adoptive parent(s) is in the child's best interests;

(3) Evidence that the prospective adoptive parent(s) in the Convention country agree to the adoption;

(4) Evidence that the child will be authorized to enter and reside permanently in the Convention country or on the same basis as that of the prospective adoptive parent(s); and

(5) Evidence that the Central Authority of the Convention country has agreed to the adoption, if such consent is necessary under its laws for the adoption to become final.

(e) The agency or person makes the showing required by § 96.54(b) to the State court with jurisdiction over the adoption.

(f) The agency or person takes all necessary and appropriate measures to perform any tasks in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

**§ 96.56 [Reserved]**

**Subpart G—Decisions on Applications for Accreditation or Approval**

**§ 96.57 Scope.**

The provisions in this subpart establish the procedures for when the accrediting entity issues decisions on applications for accreditation or approval. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to agencies seeking temporary accreditation.

**§ 96.58 Notification of accreditation and approval decisions.**

(a) The accrediting entity must notify agencies and persons that applied by the transitional application deadline of its accreditation and approval decisions on a uniform notification date to be established by the Secretary. On that date, the accrediting entity must inform each applicant and the Secretary in writing whether the agency's or person's application has been granted or denied or remains pending. The accrediting entity may not provide any information about its accreditation or approval decisions to any agency or person or to the public until the uniform notification date. If the Secretary requests information on the interim or final status of an applicant prior to the uniform notification date, the accrediting entity must provide such information to the Secretary.

(b) Notwithstanding the provisions in paragraph (a) of this section, the accrediting entity may, in its discretion, communicate with agencies and persons that applied by the transitional application date about the status of their pending applications for the sole purpose of affording them an opportunity to correct deficiencies that may hinder or prevent accreditation or approval.

(c) The accrediting entity must routinely inform applicants that applied after the transitional application date in writing of its accreditation and approval decisions, as those decisions are finalized, but may not do so earlier than the uniform notification date referenced in paragraph (a) of this section. The accrediting entity must routinely provide this information to the Secretary in writing.

**§ 96.59 Review of decisions to deny accreditation or approval.**

(a) There is no administrative or judicial review of an accrediting entity's decision to deny an application for accreditation or approval. As provided in § 96.79, a decision to deny for these purposes includes:

(1) A denial of the agency's or person's initial application for accreditation or approval;

(2) A denial of an application made after cancellation or refusal to renew by the accrediting entity; and

(3) A denial of an application made after cancellation or debarment by the Secretary.

(b) The agency or person may petition the accrediting entity for reconsideration of a denial. The accrediting entity must establish internal review procedures that provide an opportunity for an agency or person

to petition for reconsideration of the denial.

**§ 96.60 Length of accreditation or approval period.**

(a) Except as provided in paragraph (b) of this section, the accrediting entity will accredit or approve an agency or person for a period of four years. The accreditation or approval period will commence either on the date the Convention enters into force for the United States (if the agency or person is accredited or approved before that date) or on the date that the agency or person is granted accreditation or approval.

(b) In order to stagger the renewal requests from agencies and persons that applied for accreditation or approval by the transitional application deadline, to prevent renewal requests from coming due at the same time, the accrediting entity may accredit or approve some agencies and persons that applied by the transitional application date for a period of between three and five years for their first accreditation or approval cycle. The accrediting entity must establish criteria, to be approved by the Secretary, for choosing which agencies and persons it will accredit or approve for a period of other than four years.

**§ 96.61 [Reserved]**

**Subpart H—Renewal of Accreditation or Approval**

**§ 96.62 Scope.**

The provisions in this subpart establish the procedures for renewal of an agency's accreditation or a person's approval. Temporary accreditation may not be renewed, and the provisions in this subpart do not apply to temporarily accredited agencies.

**§ 96.63 Renewal of accreditation or approval.**

(a) The accrediting entity must advise accredited agencies and approved persons that it monitors of the date by which they should seek renewal of their accreditation or approval so that the renewal process can reasonably be completed prior to the expiration of the agency's or person's current accreditation or approval. If the accredited agency or approved person does not wish to renew its accreditation or approval, it must immediately notify the accrediting entity and take all necessary steps to complete its Convention cases and to transfer its pending Convention cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate, under the oversight of the accrediting entity, before its accreditation or approval expires.

(b) The accredited agency or approved person may seek renewal from a different accrediting entity than the one that handled its prior application. If it changes accrediting entities, the accredited agency or approved person must so notify the accrediting entity that handled its prior application by the date on which the agency or person must (pursuant to paragraph (a) of this section) seek renewal of its status. The accredited agency or approved person must follow the new accrediting entity's instructions when submitting a request for renewal and preparing documents and other information for the new accrediting entity to review in connection with the renewal request.

(c) The accrediting entity must process the request for renewal in a timely fashion. Before deciding whether to renew the accreditation or approval of an agency or person, the accrediting entity may, in its discretion, advise the agency or person of any deficiencies that may hinder or prevent its renewal and defer a decision to allow the agency or person to correct the deficiencies. The accrediting entity must notify the accredited agency, approved person, and the Secretary in writing when it renews or refuses to renew an agency's or person's accreditation or approval.

(d) Sections 96.24, 96.25, and 96.26, which relate to evaluation procedures and to requests for and use of information, and § 96.27, which relates to the substantive criteria for evaluating applicants for accreditation or approval, other than § 96.27(e), will govern determinations about whether to renew accreditation or approval. In lieu of § 96.27(e), if the agency or person has been suspended by an accrediting entity or the Secretary during its most current accreditation or approval cycle, the accrediting entity may take the reasons underlying the suspension into account when determining whether to renew accreditation or approval and may refuse to renew accreditation or approval based on the prior suspension.

**§ 96.64 [Reserved]**

**Subpart I—Routine Oversight by Accrediting Entities**

**§ 96.65 Scope.**

The provisions in this subpart establish the procedures for routine oversight of accredited agencies and approved persons. Temporary accreditation is governed by the provisions of subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to temporarily accredited agencies.

**§ 96.66 Oversight of accredited agencies and approved persons by the accrediting entity.**

(a) The accrediting entity must monitor agencies it has accredited and persons it has approved at least annually to ensure that they are in substantial compliance with the standards in subpart F of this part, as determined using a method approved by the Secretary in accordance with § 96.27(d). The accrediting entity must investigate complaints about accredited agencies and approved persons, as provided in subpart J of this part.

(b) An accrediting entity may, on its own initiative, conduct site visits to inspect an agency's or person's premises or programs, with or without advance notice, for purposes of random verification of its continued compliance or to investigate a complaint. The accrediting entity may consider any information about the agency or person that becomes available to it about the compliance of the agency or person. The provisions of §§ 96.25 and 96.26 govern requests for and use of information.

(c) The accrediting entity must require accredited agencies or approved persons to attest annually that they have remained in substantial compliance and to provide supporting documentation to indicate such ongoing compliance with the standards in subpart F of this part.

**§ 96.67 [Reserved]**

**Subpart J—Oversight Through Review of Complaints**

**§ 96.68 Scope.**

The provisions in this subpart establish the procedures that the accrediting entity will use for processing complaints against accredited agencies and approved persons (including complaints concerning their use of supervised providers) that raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA, as determined by the accrediting entity or the Secretary, and that are therefore relevant to the oversight functions of the accrediting entity or the Secretary. Temporary accreditation is governed by the provisions of subpart N of this part; as provided in § 96.103, procedures for processing complaints on temporarily accredited agencies must comply with this subpart.

**§ 96.69 Filing of complaints against accredited agencies and approved persons.**

(a) Complaints described in § 96.68 will be subject to review by the accrediting entity pursuant to §§ 96.71

and 96.72, when submitted as provided in this section and § 96.70.

(b) Complaints against accredited agencies and approved persons by parties to specific Convention adoption cases and relating to that case must first be submitted by the complainant in writing to the primary provider and to the agency or person providing adoption services, if a U.S. provider different from the primary provider. If the complaint cannot be resolved through the complaint processes of the primary provider or the agency or person providing the services (if different), or if the complaint was resolved by an agreement to take action but the primary provider or the agency or person providing the service (if different) failed to take such action within thirty days of agreeing to do so, the complaint may then be filed with the Complaint Registry in accordance with § 96.70.

(c) An individual who is not party to a specific Convention adoption case but who has information about an accredited agency or approved person may provide that information by filing it in the form of a complaint with the Complaint Registry in accordance with § 96.70.

(d) A Federal, State, or local government official or a foreign Central Authority may file a complaint with the Complaint Registry in accordance with § 96.70, or may raise the matter in writing directly with the accrediting entity, who will record the complaint in the Complaint Registry, or with the Secretary, who will record the complaint in the Complaint Registry, if appropriate, and refer it to the accrediting entity for review pursuant to § 96.71 or take such other action as the Secretary deems appropriate.

#### **§ 96.70 Operation of the Complaint Registry.**

(a) The Secretary will establish a Complaint Registry to support the accrediting entities in fulfilling their oversight responsibilities, including the responsibilities of recording, screening, referring, and otherwise taking action on complaints received, and to support the Secretary in the Secretary's oversight responsibilities as the Secretary deems appropriate. The Secretary may provide for the Complaint Registry to be funded in whole or in part from fees collected by the Secretary pursuant to section 403(b) of the IAA (42 U.S.C. 14943(b)) or by the accrediting entities.

(b) The Complaint Registry will:

(1) Receive and maintain records of complaints about accredited agencies, temporarily accredited agencies, and approved persons (including complaints concerning their use of supervised

providers) and make such complaints available to the appropriate accrediting entity and the Secretary;

(2) Receive and maintain information regarding action taken to resolve each complaint by the accrediting entity or the Secretary;

(3) Track compliance with any deadlines applicable to the resolution of complaints;

(4) Generate reports designed to show possible patterns of complaints; and

(5) Perform such other functions as the Secretary may determine.

(c) Forms and information necessary to submit complaints to the Complaint Registry electronically or by such other means as the Secretary may determine will be accessible through the Department's website to persons who wish to file complaints. Such forms will be designed to ensure that each complaint complies with the requirements of § 96.69.

(d) Accrediting entities will have access to, and the capacity to enter data into, the Complaint Registry as the Secretary deems appropriate.

(e) Nothing in this part shall be construed to limit the Secretary's authority to take such action as the Secretary deems appropriate with respect to complaints.

#### **§ 96.71 Review by the accrediting entity of complaints against accredited agencies and approved persons.**

(a) The accrediting entity must establish written procedures, including deadlines, for recording, investigating, and acting upon complaints it receives pursuant to §§ 96.69 and 96.70(b)(1). The procedures must be consistent with this section and be approved by the Secretary. The accrediting entity must make written information about its complaint procedures available upon request.

(b) If the accrediting entity determines that a complaint implicates the Convention, the IAA, or the regulations implementing the IAA:

(1) The accrediting entity must verify that the complainant has already attempted to resolve the complaint as described in § 96.69(b) and, if not, may refer the complaint to the agency or person, or to the primary provider, for attempted resolution through its internal complaint procedures;

(2) The accrediting entity may conduct whatever investigative activity (including site visits) it considers necessary to determine whether any relevant accredited agency or approved person may maintain accreditation or approval as provided in § 96.27. The provisions of §§ 96.25 and 96.26 govern requests for and use of information. The

accrediting entity must give priority to complaints submitted pursuant to § 96.69(d);

(3) If the accrediting entity determines that the agency or person may not maintain accreditation or approval, it must take adverse action pursuant to subpart K of this part.

(c) When the accrediting entity has completed its complaint review process, it must provide written notification of the outcome of its investigation, and any actions taken, to the complainant, or to any other entity that referred the information.

(d) The accrediting entity will enter information about the outcomes of its investigations and its actions on complaints into the Complaint Registry as provided in its agreement with the Secretary.

(e) The accrediting entity may not take any action to discourage an individual from, or retaliate against an individual for, making a complaint, expressing a grievance, questioning the conduct of, or expressing an opinion about the performance of an accredited agency, an approved person, or the accrediting entity.

#### **§ 96.72 Referral of complaints to the Secretary and other authorities.**

(a) An accrediting entity must report promptly to the Secretary any substantiated complaint that:

(1) Reveals that an accredited agency or approved person has engaged in a pattern of serious, willful, grossly negligent, or repeated failures to comply with the standards in subpart F of this part; or

(2) Indicates that continued accreditation or approval would not be in the best interests of the children and families concerned.

(b) An accrediting entity must, after consultation with the Secretary, refer, as appropriate, to a State licensing authority, the Attorney General, or other law enforcement authorities any substantiated complaints that involve conduct that is:

(1) Subject to the civil or criminal penalties imposed by section 404 of the IAA (42 U.S.C. 14944);

(2) In violation of the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*); or

(3) Otherwise in violation of Federal, State, or local law.

(c) When an accrediting entity makes a report pursuant to paragraphs (a) or (b) of this section, it must indicate whether it is recommending that the Secretary take action to debar the agency or person, either temporarily or permanently.

**§ 96.73 [Reserved]****Subpart K—Adverse Action by the Accrediting Entity****§ 96.74 Scope.**

The provisions in this subpart establish the procedures governing adverse action by an accrediting entity against accredited agencies and approved persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions of this subpart do not apply to temporarily accredited agencies.

**§ 96.75 Adverse action against accredited agencies or approved persons not in substantial compliance.**

The accrediting entity must take adverse action when it determines that an accredited agency or approved person may not maintain accreditation or approval as provided in § 96.27. The accrediting entity is authorized to take any of the following actions against an accredited agency or approved person whose compliance the entity oversees. Each of these actions by an accrediting entity is considered an adverse action for purposes of the IAA and the regulations in this part:

- (a) Suspending accreditation or approval;
- (b) Canceling accreditation or approval;
- (c) Refusing to renew accreditation or approval;
- (d) Requiring an accredited agency or approved person to take a specific corrective action to bring itself into compliance; and
- (e) Imposing other sanctions including, but not limited to, requiring an accredited agency or approved person to cease providing adoption services in a particular case or in a specific Convention country.

**§ 96.76 Procedures governing adverse action by the accrediting entity.**

(a) The accrediting entity must decide which adverse action to take based on the seriousness and type of violation and on the extent to which the accredited agency or approved person has corrected or failed to correct deficiencies of which it has been previously informed. The accrediting entity must notify an accredited agency or approved person in writing of its decision to take an adverse action against the agency or person. The accrediting entity's written notice must identify the deficiencies prompting imposition of the adverse action.

(b) Before taking adverse action, the accrediting entity may, in its discretion,

advise an accredited agency or approved person in writing of any deficiencies in its performance that may warrant an adverse action and provide it with an opportunity to demonstrate that an adverse action would be unwarranted before the adverse action is imposed. If the accrediting entity takes the adverse action without such prior notice, it must provide a similar opportunity to demonstrate that the adverse action was unwarranted after the adverse action is imposed, and may withdraw the adverse action based on the information provided.

(c) The provisions in §§ 96.25 and 96.26 govern requests for and use of information.

**§ 96.77 Responsibilities of the accredited agency, approved person, and accrediting entity following adverse action by the accrediting entity.**

(a) If the accrediting entity takes an adverse action against an agency or person, the action will take effect immediately unless the accrediting entity agrees to a later effective date.

(b) If the accrediting entity suspends or cancels the accreditation or approval of an agency or person, the agency or person must immediately, or by any later effective date set by the accrediting entity, cease to provide adoption services in all Convention cases. In the case of suspension, it must consult with the accrediting entity about whether to transfer its Convention adoption cases and adoption records. In the case of cancellation, it must execute the plans required by §§ 96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(c) If the accrediting entity refuses to renew the accreditation or approval of an agency or person, the agency or person must cease to provide adoption services in all Convention cases upon expiration of its existing accreditation or approval. It must take all necessary steps to complete its Convention cases before its accreditation or approval

expires. It must also execute the plans required by §§ 96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its pending Convention cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(d) The accrediting entity must notify the Secretary, in accordance with procedures established in its agreement with the Secretary, when it takes an adverse action that changes the accreditation or approval status of an agency or person. The accrediting entity must also notify the relevant State licensing authority as provided in the agreement.

**§ 96.78 Accrediting entity procedures to terminate adverse action.**

(a) The accrediting entity must maintain internal petition procedures, approved by the Secretary, to give accredited agencies and approved persons an opportunity to terminate adverse actions on the grounds that the deficiencies necessitating the adverse action have been corrected. The accrediting entity must inform the agency or person of these procedures when it informs them of the adverse action pursuant to § 96.76(a). An accrediting entity is not required to maintain procedures to terminate adverse actions on any other grounds, or to maintain procedures to review its adverse actions, and must obtain the consent of the Secretary if it wishes to make such procedures available.

(b) An accrediting entity may terminate an adverse action it has taken only if the agency or person demonstrates to the satisfaction of the accrediting entity that the deficiencies that led to the adverse action have been corrected. The accrediting entity must notify an agency or person in writing of its decision on the petition to terminate the adverse action.

(c) If the accrediting entity described in paragraph (b) of this section is no longer providing accreditation or approval services, the agency or person may petition any accrediting entity with jurisdiction over its application.

(d) If the accrediting entity cancels or refuses to renew an agency's or person's accreditation or approval, and does not terminate the adverse action pursuant to paragraph (b) of this section, the agency or person may reapply for accreditation or approval. Before doing so, the agency or person must request and obtain permission to make a new application from the accrediting entity that cancelled or refused to renew its accreditation or approval or, if such entity is no longer designated as an accrediting entity, from any alternate accrediting entity designated by the Secretary to give such permission. The accrediting entity may grant such permission only if the agency or person demonstrates to the satisfaction of the accrediting entity that the specific deficiencies that led to the cancellation or refusal to renew have been corrected.

(e) If the accrediting entity grants the agency or person permission to reapply, the agency or person may file an application with that accrediting entity in accordance with subpart D of this part.

(f) Nothing in this section shall be construed to prevent an accrediting entity from withdrawing an adverse action if it concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the accrediting entity will take appropriate steps to notify the Secretary and the Secretary will take appropriate steps to notify the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.79 Administrative or judicial review of adverse action by the accrediting entity.**

(a) Except to the extent provided by the procedures in § 96.78, an adverse action by an accrediting entity shall not be subject to administrative review.

(b) Section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)) provides for judicial review in Federal court of adverse actions by an accrediting entity, regardless of whether the entity is described in § 96.5(a) or (b). When any petition brought under section 202(c)(3) raises as an issue whether the deficiencies necessitating the adverse action have been corrected, the procedures maintained by the accrediting entity pursuant to § 96.78 must first be exhausted. Adverse actions are only those actions listed in § 96.75. There is no judicial review of an accrediting entity's decision to deny accreditation or approval, including:

- (1) A denial of an initial application;
- (2) A denial of an application made after cancellation or refusal to renew by the accrediting entity; and

(3) A denial of an application made after cancellation or debarment by the Secretary.

(c) In accordance with section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)), an accredited agency or approved person that is the subject of an adverse action by an accrediting entity may petition the United States district court in the judicial district in which the agency is located or the person resides to set aside the adverse action imposed by the accrediting entity. The United States district court shall review the adverse action in accordance with 5 U.S.C. 706. When an accredited agency or approved person petitions a United States district court to review the adverse action of an accrediting entity, the accrediting entity will be considered an agency as defined in 5 U.S.C. 701 for the purpose of judicial review of the adverse action.

**§ 96.80 [Reserved]**

**Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary**

**§ 96.81 Scope.**

The provisions in this subpart establish the procedures governing adverse action by the Secretary against accredited agencies and approved persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to temporarily accredited agencies.

**§ 96.82 The Secretary's response to actions by the accrediting entity.**

(a) There is no administrative review by the Secretary of an accrediting entity's decision to deny accreditation or approval, nor of any decision by an accrediting entity to take an adverse action.

(b) When informed by an accrediting entity that an agency has been accredited or a person has been approved, the Secretary will take appropriate steps to ensure that relevant information about the accredited agency or approved person is provided to the Permanent Bureau of the Hague Conference on Private International Law. When informed by an accrediting entity that it has taken an adverse action that impacts an agency's or person's accreditation or approval status, the Secretary will take appropriate steps to inform the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.83 Suspension or cancellation of accreditation or approval by the Secretary.**

(a) The Secretary must suspend or cancel the accreditation or approval granted by an accrediting entity when the Secretary finds, in the Secretary's discretion, that the agency or person is substantially out of compliance with the standards in subpart F of this part and that the accrediting entity has failed or refused, after consultation with the Secretary, to take action.

(b) The Secretary may suspend or cancel the accreditation or approval granted by an accrediting entity if the Secretary finds that such action:

- (1) Will protect the interests of children;
- (2) Will further U.S. foreign policy or national security interests; or
- (3) Will protect the ability of U.S. citizens to adopt children under the Convention.

(c) If the Secretary suspends or cancels the accreditation or approval of an agency or person, the Secretary will take appropriate steps to notify both the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.84 Reinstatement of accreditation or approval after suspension or cancellation by the Secretary.**

(a) An agency or person may petition the Secretary for relief from the Secretary's suspension or cancellation of its accreditation or approval on the grounds that the deficiencies necessitating the suspension or cancellation have been corrected. If the Secretary is satisfied that the deficiencies that led to the suspension or cancellation have been corrected, the Secretary shall, in the case of a suspension, terminate the suspension or, in the case of a cancellation, notify the agency or person that it may reapply for accreditation or approval to the same accrediting entity that handled its prior application for accreditation or approval. If that accrediting entity is no longer providing accreditation or approval services, the agency or person may reapply to any accrediting entity with jurisdiction over its application. If the Secretary terminates a suspension or permits an agency or person to reapply for accreditation or approval, the Secretary will so notify the appropriate accrediting entity. If the Secretary terminates a suspension, the Secretary will also take appropriate steps to notify the Permanent Bureau of the Hague Conference on Private International Law of the reinstatement.

(b) Nothing in this section shall be construed to prevent the Secretary from withdrawing a cancellation or

suspension if the Secretary concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the Secretary will take appropriate steps to notify the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.85 Temporary and permanent debarment by the Secretary.**

(a) The Secretary may temporarily or permanently debar an agency from accreditation or a person from approval on the Secretary's own initiative, at the request of DHS, or at the request of an accrediting entity. A debarment of an accredited agency or approved person will automatically result in the cancellation of accreditation or approval by the Secretary, and the accrediting entity shall deny any pending request for renewal of accreditation or approval.

(b) The Secretary may issue a debarment order only if the Secretary, in the Secretary's discretion, determines that:

(1) There is substantial evidence that the agency or person is out of compliance with the standards in subpart F of this part; and

(2) There has been a pattern of serious, willful, or grossly negligent failures to comply, or other aggravating circumstances indicating that continued accreditation or approval would not be in the best interests of the children and families concerned. For purposes of this paragraph:

(i) "The children and families concerned" include any children and any families whose interests have been or may be affected by the agency's or person's actions;

(ii) A failure to comply with § 96.47 (home study requirements) shall constitute a "serious failure to comply" unless it is shown by clear and convincing evidence that such noncompliance had neither the purpose nor the effect of determining the outcome of a decision or proceeding by a court or other competent authority in the United States or the child's country of origin; and

(iii) Repeated serious, willful, or grossly negligent failures to comply with § 96.47 (home study requirements) by an agency or person after consultation between the Secretary and the accrediting entity with respect to previous noncompliance by such agency or person shall constitute a pattern of serious, willful, or grossly negligent failures to comply.

**§ 96.86 Length of debarment period and reapplication after temporary debarment.**

(a) In the case of a temporary debarment order, the order will take

effect on the date specified in the order and will specify a date, not earlier than three years later, on or after which the agency or person may petition the Secretary for withdrawal of the temporary debarment. If the Secretary withdraws the temporary debarment, the agency or person may then reapply for accreditation or approval to the same accrediting entity that handled its prior application for accreditation or approval. If that accrediting entity is no longer providing accreditation or approval services, the agency or person may apply to any accrediting entity with jurisdiction over its application.

(b) In the case of a permanent debarment order, the order will take effect on the date specified in the order. The agency or person will not be permitted to apply again to an accrediting entity for accreditation or approval, or to the Secretary for termination of the debarment.

(c) Nothing in this section shall be construed to prevent the Secretary from withdrawing a debarment if the Secretary concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the Secretary will take appropriate steps to notify the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.87 Responsibilities of the accredited agency, approved person, and accrediting entity following suspension, cancellation, or debarment by the Secretary.**

If the Secretary suspends or cancels the accreditation or approval of an agency or person, or debars an agency or person, the agency or person must cease to provide adoption services in all Convention cases. In the case of suspension, it must consult with the accrediting entity about whether to transfer its Convention adoption cases and adoption records. In the case of cancellation or debarment, it must execute the plans required by §§ 96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other

accredited agencies or approved persons, or to public domestic authorities, as appropriate.

**§ 96.88 Review of suspension, cancellation, or debarment by the Secretary.**

(a) Except to the extent provided by the procedures in § 96.84, an adverse action by the Secretary shall not be subject to administrative review.

(b) Section 204(d) of the IAA (42 U.S.C. 14924(d)) provides for judicial review of final actions by the Secretary. When any petition brought under section 204(d) raises as an issue whether the deficiencies necessitating a suspension or cancellation of accreditation or approval have been corrected, procedures maintained by the Secretary pursuant to § 96.84(a) must first be exhausted. A suspension or cancellation of accreditation or approval, and a debarment (whether temporary or permanent) by the Secretary are final actions subject to judicial review. Other actions by the Secretary are not final actions and are not subject to judicial review.

(c) In accordance with section 204(d) of the IAA (42 U.S.C. 14924(d)), an agency or person that has been suspended, cancelled, or temporarily or permanently debarred by the Secretary may petition the United States District Court for the District of Columbia, or the United States district court in the judicial district in which the person resides or the agency is located, pursuant to 5 U.S.C. 706, to set aside the action.

**§ 96.89 [Reserved]**

**Subpart M—Dissemination and Reporting of Information by Accrediting Entities**

**§ 96.90 Scope.**

The provisions in this subpart govern the dissemination and reporting of information on accredited agencies and approved persons by accrediting entities. Temporary accreditation is governed by the provisions of subpart N of this part and, as provided for in § 96.110, reports on temporarily accredited agencies must comply with this subpart.

**§ 96.91 Dissemination of information to the public about accreditation and approval status.**

(a) Once the Convention has entered into force for the United States, the accrediting entity must maintain and make available to the public on a quarterly basis the following information:

(1) The name, address, and contact information for each agency and person it has accredited or approved;

(2) The names of agencies and persons to which it has denied accreditation or approval that have not subsequently been accredited or approved;

(3) The names of agencies and persons that have been subject to withdrawal of temporary accreditation, suspension, cancellation, refusal to renew accreditation or approval, or debarment by the accrediting entity or the Secretary; and

(4) Other information specifically authorized in writing by the accredited agency or approved person to be disclosed to the public.

(b) Once the Convention has entered into force for the United States, each accrediting entity must make the following information available to individual members of the public upon specific request:

(1) Confirmation of whether or not a specific agency or person has a pending application for accreditation or approval, and, if so, the date of the application and whether it is under active consideration or whether a decision on the application has been deferred; and

(2) If an agency or person has been subject to a withdrawal of temporary accreditation, suspension, cancellation, refusal to renew accreditation or approval, or debarment, a brief statement of the reasons for the action.

**§ 96.92 Dissemination of information to the public about complaints against accredited agencies and approved persons.**

Once the Convention has entered into force for the United States, each accrediting entity must maintain a written record documenting each complaint received and the steps taken in response to it. This information may be disclosed to the public as follows:

(a) The accrediting entity must verify, upon inquiry from a member of the public, whether there have been any substantiated complaints against an accredited agency or approved person, and if so, provide information about the status and nature of any such complaints.

(b) The accrediting entity must have procedures for disclosing information about complaints that are substantiated.

**§ 96.93 Reports to the Secretary about accredited agencies and approved persons and their activities.**

(a) The accrediting entity must make annual reports to the Secretary on the information it collects from accredited agencies and approved persons pursuant to § 96.43. The accrediting

entity must make semi-annual reports to the Secretary that summarize for the preceding six-month period the following information:

(1) The accreditation and approval status of applicants, accredited agencies, and approved persons;

(2) Any instances where it has denied accreditation or approval;

(3) Any adverse actions taken against an accredited agency or approved person and any withdrawals of temporary accreditation;

(4) All substantiated complaints against accredited agencies and approved persons and the impact of such complaints on their accreditation or approval status;

(5) The number, nature, and outcome of complaint investigations carried out by the accrediting entity as well as the shortest, longest, average, and median length of time expended to complete complaint investigations; and

(6) Any discernible patterns in complaints received about specific agencies or persons, as well as any discernible patterns of complaints in the aggregate.

(b) The accrediting entity must report to the Secretary within thirty days of the time it learns that an accredited agency or approved person:

(1) Has ceased to provide adoption services; or

(2) Has transferred its Convention cases and adoption records.

(c) In addition to the reporting requirements contained in § 96.72, an accrediting entity must immediately notify the Secretary in writing:

(1) When it accredits an agency or approves a person;

(2) When it renews the accreditation or approval of an agency or person; or

(3) When it takes an adverse action against an accredited agency or approved person that impacts its accreditation or approval status or withdraws an agency's temporary accreditation.

**§ 96.94 [Reserved]**

**Subpart N—Procedures and Standards Relating to Temporary Accreditation**

**§ 96.95 Scope.**

(a) The provisions in this subpart govern only temporary accreditation. The provisions in subpart F of this part cover full accreditation of agencies and approval of persons.

(b) Agencies that meet the eligibility requirements established in this subpart may apply for temporary accreditation that will run for a one- or two-year period following the Convention's entry into force for the United States. Persons

may not be temporarily approved. Temporary accreditation is only available to agencies that apply by the transitional application deadline and who complete the temporary accreditation process by the deadline for initial accreditation or approval in accordance with § 96.19.

**§ 96.96 Eligibility requirements for temporary accreditation.**

(a) An accrediting entity may not temporarily accredit an agency unless the agency demonstrates to the satisfaction of the accrediting entity that:

(1) It has provided adoption services in fewer than 100 intercountry adoption cases in the calendar year preceding the year in which the transitional application deadline falls. For purposes of this subpart, the number of cases includes all intercountry adoption cases that were handled by, or under the responsibility of, the agency, regardless of whether they involved countries party to the Convention;

(2) It qualifies for nonprofit tax treatment under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or for nonprofit status under the law of any State;

(3) It is properly licensed under State law to provide adoption services in at least one State. It is, and for the last three years prior to the transitional application deadline has been, providing intercountry adoption services;

(4) It has the capacity to maintain and provide to the accrediting entity and the Secretary, within thirty days of request, all of the information relevant to the Secretary's reporting requirements under section 104 of the IAA (42 U.S.C. 14914); and

(5) It has not been involved in any improper conduct related to the provision of intercountry adoption or other services, as evidenced in part by the following:

(i) The agency has maintained its State license without suspension or cancellation for misconduct during the entire period in which it has provided intercountry adoption services;

(ii) The agency has not been subject to a finding of fault or liability in any administrative or judicial action in the three years preceding the transitional application deadline; and

(iii) The agency has not been the subject of any criminal findings of fraud or financial misconduct in the three years preceding the transitional application deadline.

(b) An accrediting entity may not temporarily accredit an agency unless the agency also demonstrates to the



satisfaction of the accrediting entity that it has a comprehensive plan for applying for and achieving full accreditation before the agency's temporary accreditation expires, and is taking steps to execute that plan.

**§ 96.97 Application procedures for temporary accreditation.**

(a) An agency seeking temporary accreditation must submit an application to an accrediting entity with jurisdiction over its application, with the required fee(s), by the transitional application deadline established pursuant to § 96.19 of this part. Applications for temporary accreditation that are filed after the temporary application deadline will not be considered.

(b) An agency may not seek temporary accreditation and full accreditation at the same time. The agency's application must clearly state whether it is seeking temporary accreditation or full accreditation. An eligible agency's option of applying for temporary accreditation will be deemed to have been waived if the agency also submits a separate application for full accreditation prior to the transitional application deadline. The agency may apply to only one accrediting entity at a time.

(c) The accrediting entity must establish and follow uniform application procedures and must make information about these procedures available to agencies that are considering whether to apply for temporary accreditation. The accrediting entity must evaluate the applicant for temporary accreditation in a timely fashion. The accrediting entity must use its best efforts to provide a reasonable opportunity for an agency that applies for temporary accreditation by the transitional application deadline to complete the temporary accreditation process by the deadline for initial accreditation or approval. If an agency seeks temporary accreditation under this subpart, it will be included on the initial list deposited by the Secretary with the Permanent Bureau of the Hague Conference on Private International Law only if it is granted temporary accreditation by the deadline for initial accreditation or approval established pursuant to § 96.19(a).

**§ 96.98 Length of temporary accreditation period.**

(a) One-year temporary accreditation. An agency that has provided adoption services in 50–99 intercountry adoptions in the calendar year preceding the year in which the transitional application date falls may

apply for a one-year period of temporary accreditation. The one-year period will commence on the date that the Convention enters into force for the United States.

(b) Two-year temporary accreditation. An agency that has provided adoption services in fewer than 50 intercountry adoptions in the calendar year preceding the year in which the transitional application date falls may apply for a two-year period of temporary accreditation. The two-year period will commence on the date that the Convention enters into force for the United States.

**§ 96.99 Converting an application for temporary accreditation to an application for full accreditation.**

(a) The accrediting entity may, in its discretion, permit an agency that has applied for temporary accreditation to convert its application to an application for full accreditation, subject to submission of any additional required documentation, information, and fee(s). The accrediting entity may grant a request for conversion if the accrediting entity has determined that the applicant is not in fact eligible for temporary accreditation based on the number of adoption cases it has handled; if the agency has concluded that it can complete the full accreditation process sooner than expected; or for any other reason that the accrediting entity deems appropriate.

(b) If an application is converted after the transitional application deadline, it will be treated as an application filed after the transitional application deadline, and the agency may not necessarily be provided an opportunity to complete the accreditation process in time to be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.100 Procedures for evaluating applicants for temporary accreditation.**

(a) To evaluate an agency for temporary accreditation, the accrediting entity must:

(1) Review the agency's written application and supporting documentation; and

(2) Verify the information provided by the agency, as appropriate. The accrediting entity may also request additional documentation and information from the agency in support of the application as it deems necessary.

(b) The accrediting entity may also decide, in its discretion, that it must conduct a site visit to determine

whether to approve the application for temporary accreditation. The site visit may include interviews with birth parents, adoptive parent(s), prospective adoptive parent(s), and adult adoptee(s) served by the agency, interviews with the agency's employees, and interviews with other individual(s) knowledgeable about its provision of adoption services. It may also include a review of on-site documents. The accrediting entity must, to the extent possible, advise the agency in advance of documents it wishes to review during the site visit. The provisions of §§ 96.25 and 96.26 will govern requests for and use of information.

(c) Before deciding whether to grant temporary accreditation to the agency, the accrediting entity may, in its discretion, advise the agency of any deficiencies that may hinder or prevent its temporary accreditation and defer a decision to allow the agency to correct the deficiencies.

(d) The accrediting entity may only use the criteria contained in § 96.96 when determining whether an agency is eligible for temporary accreditation.

(e) The eligibility criteria contained in § 96.96 and the standards contained in § 96.104 do not eliminate the need for an agency to comply fully with the laws of the jurisdictions in which it operates. An agency must provide adoption services in Convention cases consistent with the laws of any State in which it operates and with the Convention and the IAA.

**§ 96.101 Notification of temporary accreditation decisions.**

(a) The accrediting entity must notify agencies of its temporary accreditation decisions on the uniform notification date to be established by the Secretary pursuant to § 96.58(a). On that date, the accrediting entity must inform each applicant and the Secretary in writing whether the agency has been granted temporary accreditation. The accrediting entity may not provide any information about its temporary accreditation decisions to any agency or to the public until the uniform notification date. If the Secretary requests information on the interim or final status of an agency prior to the uniform notification date, the accrediting entity must provide such information to the Secretary.

(b) Notwithstanding paragraph (a) of this section, the accrediting entity may, in its discretion, communicate with agencies about the status of their pending applications for temporary accreditation for the sole purpose of affording them an opportunity to correct deficiencies that may hinder their

temporary accreditation. When informed by an accrediting entity that an agency has been temporarily accredited, the Secretary will take appropriate steps to ensure that relevant information about a temporarily accredited agency is provided to the Permanent Bureau of the Hague Conference on Private International Law.

**§ 96.102 Review of temporary accreditation decisions.**

There is no administrative or judicial review of an accrediting entity's decision to deny temporary accreditation.

**§ 96.103 Oversight by accrediting entities.**

(a) The accrediting entity must oversee an agency that it has temporarily accredited by monitoring whether the agency is in substantial compliance with the standards contained in § 96.104 and through the process of assessing the agency's application for full accreditation when it is filed. The accrediting entity must also investigate any complaints or other information that becomes available to it about an agency it has temporarily accredited. Complaints against a temporarily accredited agency must be handled in accordance with subpart J of this part. For purposes of subpart J of this part, the temporarily accredited agency will be treated as if it were a fully accredited agency, except that:

(1) The relevant standards will be those contained in § 96.104 rather than those contained in subpart F of this part; and

(2) Enforcement action against the agency will be taken in accordance with § 96.105 and § 96.107 rather than in accordance with subpart K of this part.

(b) The accrediting entity may determine, in its discretion, that it must conduct a site visit to investigate a complaint or other information or otherwise monitor the agency.

(c) The accrediting entity may consider any information that becomes available to it about the compliance of the agency. The provisions of §§ 96.25 and 96.26 govern requests for and use of information.

**§ 96.104 Performance standards for temporary accreditation.**

The accrediting entity may not maintain an agency's temporary accreditation unless the agency demonstrates to the satisfaction of the accrediting entity that it is in substantial compliance with the following standards:

(a) The agency follows applicable licensing and regulatory requirements in

all jurisdictions in which it provides adoption services;

(b) It does not engage in any improper conduct related to the provision of intercountry adoption services, as evidenced in part by the following:

(1) It maintains its State license without suspension or cancellation for misconduct;

(2) It is not subject to a finding of fault or liability in any administrative or judicial action; and

(3) It is not the subject of any criminal findings of fraud or financial misconduct;

(c) It adheres to the standards in § 96.36 prohibiting child buying;

(d) It adheres to the standards for responding to complaints in accordance with § 96.41;

(e) It adheres to the standards on adoption records and information relating to Convention cases in accordance with § 96.42;

(f) It adheres to the standards on providing data to the accrediting entity in accordance with § 96.43;

(g) When acting as the primary provider in a Convention adoption it complies with the standards in §§ 96.44 and 96.45 when using supervised providers in the United States and it complies with the standards in §§ 96.44 and 96.46 when using supervised providers or, to the extent permitted by § 96.14(c), other foreign providers in a Convention country;

(h) When performing or approving a home study in an incoming Convention case, it complies with the standards in § 96.47;

(i) When performing or approving a child background study or obtaining consents in an outgoing Convention case, it complies with the standards in § 96.53;

(j) When performing Convention functions in incoming or outgoing cases, it complies with the standards in § 96.52 or § 96.55;

(k) It has a plan to transfer its Convention cases and adoption records if it ceases to provide or is no longer permitted to provide adoption services in Convention cases. The plan includes provisions for an organized closure and reimbursement to clients of funds paid for services not yet rendered;

(l) It is making continual progress toward completing the process of obtaining full accreditation by the time its temporary accreditation expires; and

(m) It takes all necessary and appropriate measures to perform any tasks in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

**§ 96.105 Adverse action against a temporarily accredited agency by an accrediting entity.**

(a) If the accrediting entity determines that an agency it has temporarily accredited is substantially out of compliance with the standards in § 96.104, it may, in its discretion, withdraw the agency's temporary accreditation.

(b) The accrediting entity must notify the agency in writing of any decision to withdraw the agency's temporary accreditation. The written notice must identify the deficiencies necessitating the withdrawal. Before withdrawing the agency's temporary accreditation, the accrediting entity may, in its discretion, advise a temporarily accredited agency in writing of any deficiencies in its performance that may warrant withdrawal and provide it with an opportunity to demonstrate that withdrawal would be unwarranted before withdrawal occurs. If the accrediting entity withdraws the agency's temporary accreditation without such prior notice, it must provide a similar opportunity to demonstrate that the withdrawal was unwarranted after the withdrawal occurs, and may reinstate the agency's temporary accreditation based on the information provided.

(c) The provisions of §§ 96.25 and 96.26 govern requests for and use of information.

(d) The accrediting entity must notify the Secretary, in accordance with procedures established in its agreement with the Secretary, when it withdraws or reinstates an agency's temporary accreditation. The accrediting entity must also notify the relevant State licensing authority as provided in the agreement.

**§ 96.106 Review of the withdrawal of temporary accreditation by an accrediting entity.**

(a) A decision by an accrediting entity to withdraw an agency's temporary accreditation shall not be subject to administrative review.

(b) Withdrawal of temporary accreditation is analogous to cancellation of accreditation and is therefore an adverse action pursuant to § 96.75. In accordance with section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)), a temporarily accredited agency that is the subject of an adverse action by an accrediting entity may petition the United States district court in the judicial district in which the agency is located to set aside the adverse action imposed by the accrediting entity. The United States district court shall review the adverse

action in accordance with 5 U.S.C. 706. When a temporarily accredited agency petitions a United States district court to review the adverse action of an accrediting entity, the accrediting entity will be considered an agency as defined in 5 U.S.C. 701 for the purpose of judicial review of the adverse action.

**§ 96.107 Adverse action against a temporarily accredited agency by the Secretary.**

(a) The Secretary may, in the Secretary's discretion, withdraw an agency's temporary accreditation if the Secretary finds that the agency is substantially out of compliance with the standards in § 96.104 and the accrediting entity has failed or refused, after consultation with the Secretary, to take appropriate enforcement action.

(b) The Secretary may also withdraw an agency's temporary accreditation if the Secretary finds that such action:

- (1) Will protect the interests of children;
- (2) Will further U.S. foreign policy or national security interests; or
- (3) Will protect the ability of U.S. citizens to adopt children under the Convention.

(c) If the Secretary withdraws an agency's temporary accreditation, the Secretary will notify the accrediting entity.

**§ 96.108 Review of the withdrawal of temporary accreditation by the Secretary.**

(a) There is no administrative review of a decision by the Secretary to withdraw an agency's temporary accreditation.

(b) Section 204(d) of the IAA (42 U.S.C. 14924(d)) provides for judicial review of final actions by the Secretary. Withdrawal of temporary accreditation, which is analogous to cancellation of accreditation, is a final action subject to judicial review.

(c) An agency whose temporary accreditation has been withdrawn by the Secretary may petition the United States District Court for the District of Columbia, or the United States district court in the judicial district in which the agency is located, to set aside the action pursuant to section 204(d) of the IAA (42 U.S.C. 14924(d)).

**§ 96.109 Effect of the withdrawal of temporary accreditation by the accrediting entity or the Secretary.**

(a) If an agency's temporary accreditation is withdrawn, it must cease to provide adoption services in all Convention cases and must execute the plan required by § 96.104(k) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to an accredited

agency, approved person, or a State archive, as appropriate.

(b) Where the agency is unable to transfer such Convention cases or adoption records in accordance with the plan or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(c) When an agency's temporary accreditation is withdrawn or reinstated, the Secretary will, where appropriate, take steps to inform the Permanent Bureau of the Hague Conference on Private International Law.

(d) An agency whose temporary accreditation has been withdrawn may continue to seek full accreditation or may withdraw its pending application and apply for full accreditation at a later time. Its application for full accreditation must be made to the same accrediting entity that granted its application for temporary accreditation. If that entity is no longer providing accreditation services, it may apply to any accrediting entity with jurisdiction over its application.

(e) If an agency continues to pursue its application for full accreditation or subsequently applies for full accreditation, the accrediting entity may take the circumstances of the withdrawal of its temporary accreditation into account when evaluating the agency for full accreditation.

**§ 96.110 Dissemination and reporting of information about temporarily accredited agencies.**

The accrediting entity must disseminate and report information about agencies it has temporarily accredited as if they were fully accredited agencies, in accordance with subpart M of this part.

**§ 96.111 Fees charged for temporary accreditation.**

(a) Any fees charged by an accrediting entity for temporary accreditation will include a non-refundable fee for temporary accreditation set forth in a schedule of fees approved by the Secretary as provided in § 96.8(a). Such fees may not exceed the costs of temporary accreditation and must include the costs of all activities associated with the temporary accreditation cycle (including, but not

limited to, costs for completing the temporary accreditation process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities). The temporary accreditation fee may not include the costs of site visit(s). The schedule of fees may provide, however, that, in the event that a site visit is required to determine whether to approve an application for temporary accreditation, to investigate a complaint or other information, or otherwise to monitor the agency, the accrediting entity may assess additional fees for actual costs incurred for travel and maintenance of evaluators and for any additional administrative costs to the accrediting entity. In such a case, the accrediting entity may estimate the additional fees and may require that the estimated amount be paid in advance, subject to a refund of any overcharge. Temporary accreditation may be denied or withdrawn if the estimated fees are not paid.

(b) An accrediting entity must make its schedule of fees available to the public, including prospective applicants for temporary accreditation, upon request. At the time of application, the accrediting entity must specify the fees to be charged in a contract between the parties and must provide notice to the applicant that no portion of the fee will be refunded if the applicant fails to become temporarily accredited.

Dated: January 13, 2006.

**Maura Harty,**

*Assistant Secretary for Consular Affairs,  
Department of State.*

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**DEPARTMENT OF STATE**

**22 CFR Parts 97 and 98**

[Public Notice 5297]

RIN 1400-AB69

**Intercountry Adoption—Preservation of Convention Records**

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This rule finalizes the proposed rule published on September 15, 2003 to implement the records preservation requirements of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention) and the Intercountry Adoption Act of 2000 (the IAA). The IAA requires that the Department of State (the Department) issue rules to govern the